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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,
GREATER BOSTON TELEVISION CORPORATION,
CHARLES RIVER CIVIL TELEVISION, INC., and
BOSTON BROADCASTERS, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI

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ERRATA

The following footnotes were inadvertently omitted in the Appendices:

Appendix D(3)—Footnote 4, page 314a, which reads 38 FCC 25 (1965).

Appendix D(4)—Footnote 5, page 327a, which reads 29 FCC 204, 212.

Appendix D(4)—Footnote 6, page 328a, which reads 22 FCC 767, 880.

Appendix D(4)—Footnote 7, page 329a, which reads 29 FCC 204, 212.

Appendix D(4)—Footnote 8, page 329a, which reads 22 FCC 767, 880, 881.

APPENDICES TO PETITION FOR CERTIORARI

Page

Appendix A—Opinion below 1a

Appendix B—Judgments below 44a

1. Judgment of Affirmance 44a
2. Order Denying Rehearing 44a

Appendix C—Opinion of April 16, 1964 ..... 47a

Appendix D—Pertinent FCC Decisions 52a

1. FCC Decision adopted January 22, 1969, released January 23, 1969 (16 FCC 2d 1) 52a
2. Initial Decision of Hearing Examiner, adopted August 10, 1966, released August 15, 1966 (16 FCC 2d 29) 80a
3. FCC Memorandum Opinion and Order adopted May 19, 1969, released May 20, 1969 (17 FCC 2d 856) 306a
4. FCC Decision adopted September 25, 1962, released September 26, 1962 (33 FCC 449) ..326a
5. FCC Decision adopted March 13, 1963, released March 15, 1963 (34 FCC 537) 345a

Appendix E—FCC Policy Statement on Comparative Broadcast Hearings, July 28, 1965 (1 FCC 2d 393) 350a

Appendix F—FCC Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, January 14, 1970 (22 FCC 2d 424) 373a

Appendix G—Statutes involved 383a

APPENDIX A

Opinion Below*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,785

GREATER BOSTON TELEVISION CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WHDH, INC., A MASSACHUSETTS CORPORATION, INTERVENOR

No. 17,788

WHDH, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

GREATER BOSTON TELEVISION CORPORATION,
A MASSACHUSETTS CORPORATION,
INTERVENOR

No. 23,154

CHARLES RIVER CIVIC TELEVISION, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

* As amended *sua sponte* by Judge Levanthal on December 31, 1970, and as further amended in the order denying rehearing entered on February 16, 1971.

WHDH, INC.,
BOSTON BROADCASTERS INC.,
INTERVENORS

No. 23,159

WHDH, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

BOSTON BROADCASTERS, INC., INTERVENOR

No. 23,172

GREATER BOSTON TV CO., INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

WHDH, INC.,
BOSTON BROADCASTERS INC.,
INTERVENORS

Appeals from the Federal Communications Commission

Decided November 13, 1970

Mr. J. Joseph Maloney, Jr. for appellant in Nos. 17,785 and 23,172 and intervenors in No. 17,788.

Mr. William J. Dempsey, with whom *Messrs. William C. Koplovitz, J. Richard Carr* and *John J. Dempsey* were on the brief, for appellant in Nos. 17,788 and 23,159 and intervenor, WHDH, in Nos. 17,785, 23,154 and 23,172. *Mr. Harry J. Ockershausen* was also on the brief for appellant in No. 17,788.

Mr. Harry M. Plotkin, with whom *Messrs. Thomas Schattenfield* and *William L. Fishman* were on the brief, for appellant in No. 23,154.

Mr. Henry Geller, General Counsel, Federal Communications Commission, with whom *Messrs. John H. Conlin,* Associate General Counsel, *Edward J. Kuhlmann* and *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Benito Gaguine, with whom *Mr. Donald E. Ward* was on the brief, for intervenor, Boston Broadcasters Inc., in Nos. 23,154, 23,159 and 23,172.

Messrs. Vincent B. Welch and *Gerald S. Rourke* filed a brief on behalf of Hampton Roads Television Corporation and Community Broadcasting of Boston, Inc., as *amici curiae.*

Before TAMM, LEVENTHAL and MACKINNON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This appeal marks the culmination of a sixteen year struggle to determine the licensee to operate a television station on Channel 5 in Boston. Rivals for the license have been before this court on three previous occasions.

The Federal Communications Commission previously made a limited award to WHDH, Inc., and that company has been operating the station, WHDH, under temporary

authorization. In the decision now under appeal, the Commission, after an extensive comparative hearing, approved the application of Boston Broadcasters, Inc. (BBI), and denied the mutually exclusive applications of WHDH, Inc., Charles River Civic Television, Inc. and Greater Boston Television Corp. (II). 16 F.C.C. 2d 1, (January 22, 1969). This result was adhered to on reconsideration by the Commission, although the petition for rehearing filed by WHDH was granted in part. 17 F.C.C. 2d 856 (May 19, 1969). We affirm the decision of the Commission.

I. *COMMISSION PROCEEDINGS*

A. *Historical Background*

The initial proceeding to select a licensee to operate on Channel 5 in Boston began in 1954 with consideration of four mutually exclusive applications. Three years later, the Commission announced the granting of the application of WHDH, Inc., a wholly owned subsidiary of the corporate publisher of the Boston Herald-Traveler newspaper. 22 F.C.C. 767. The station began broadcasting in the same year. While the decision was on appeal in this court, it came to the court's attention that the Commission's award might be subject to an infirmity by virtue of improper *ex parte* contacts with the Chairman of the Commission. Retaining jurisdiction, we remanded to the Commission for an evidentiary hearing. *Massachusetts Bay Telecasters, Inc. v. FCC,* 104 U.S.App.D.C. 226, 261 F.2d 55 (1958), *cert. denied,* 366 U.S. 918 (1961).

At the supplemental hearing before a Special Hearing Examiner, Honorable Horace Stern, formerly Justice of the Pennsylvania Supreme Court, it developed, inter alia, that during the pendency of the initial license proceedings, Mr. Robert Choate of WHDH, Inc., had arranged two luncheons with Mr. George C. McConnaughey, then Chairman of the FCC. The first of these, in the winter of 1954-

55, was used by Mr. Choate for the simple purpose of "sizing up" the new chairman. The second, however, in the spring of 1956 (after the initial hearing examiner's decision favoring another applicant, but before oral argument on exceptions to that decision), was arranged to allow Mr. Choate to discuss certain legislative matters, unspecified in advance, with Mr. McConnaughey. The matters in question proved to be the Harris-Beamer bills, which would have limited the Commission in its policy of encouraging the diversification of ownership of mass media of communication, and which had been opposed in Mr. McConnaughey's testimony before Congress. At the second luncheon Mr. Choate attempted to hand Mr. McConnaughey a draft amendment to the pending bills, which he hoped would moderate the Chairman's opposition. The Chairman, however, rebuffed Mr. Choate's attempt at discussion, and later called public attention to the matter in testimony before the House Committee on Legislative Oversight.

The Special Hearing Examiner concluded that WHDH's construction permit should be allowed to stand, that Choate could not fairly be condemned as having made an improper attempt to influence the Commission as to this particular adjudication, that there was no reason for the Chairman or any other member of the Commission to disqualify himself from participation, and that the award made to WHDH was neither void nor voidable. The Commission felt otherwise. It discerned a meaningful and improper, albeit subtle, attempt to influence the Commission, and condemned it as an effort that "does violence to the integrity of the Commission's processes." See note 36, *infra*. It filed its report with this court—which had retained jurisdiction over the original appeal, and ordered the status quo maintained. The Commission's findings and report concluded that while the original grant to WHDH was not void ab initio, it was voidable and action should

be taken to set it aside, that the conduct of WHDH while not disqualifying had been such as to reflect adversely upon it in the comparison of applicants. The course which the Commission concluded represented the best exercise of its discretion consisted of setting aside the permit; granting at the same time a special temporary authorization for WHDH to continue broadcasting on Channel 5; and reopening the entire proceeding for a comparative proceeding between WHDH and the other applicants then before it. 29 F.C.C. 204 (1960). We approved the plan and remanded accordingly. *Massachusetts Bay Telecasters, Inc. v. FCC,* 111 U.S.App.D.C. 144, 295 F.2d 131, *cert. denied,* 366 U.S. 918 (1961).

In October 1961, the Commission held new hearings, this time among three of the four original applicants. On September 25, 1962, it again awarded a construction permit to WHDH. 33 F.C.C. 449. It ascribed a demerit to WHDH because of Choate's improper approaches to the Commission Chairman. In the same order it made a grant to WHDH of an operating license for only four months—stating that it was exercising its discretion to grant a license for such a short term, as contrasted with the 3-year term permissible and normally provided, because it believed this in the public interest due to "the inroads made by WHDH upon the rules governing fair and orderly adjudication." 33 F.C.C. at 454. In 1963, after WHDH filed for its renewal, the FCC took the unusual step of assuring that comparative consideration would be given to competing applications filed within a specified 60-day "safe" period. By order of October 24, 1963, it designated for comparative hearing the WHDH renewal and the mutually exclusive applications filed during that period by BBI (intervenor before this court) and Charles River and Greater Boston TV Corp. (II), appellants, for determination, on a comparative basis, which of the proposed operators would best serve the public interest in the light of significant differences among appli-

cants as to (a) background and experience bearing on ability to operate the TV station; and (b) proposals for management and operation of the proposed TV station; and (c) proposed programming. 1 R.R. 2d 468, 472.

Meanwhile, the grant of the 4-month license had been appealed to this court, both by WHDH (which protested the conclusion of impropriety on the part of Choate and the short term of the license) and by Greater Boston TV Corp. (I). On December 21, 1963, while this appeal was pending, Mr. Choate died. We remanded again to determine what effect his death would have on the awards. Being aware of the impending comparative hearings on the renewal of WHDH's temporary license, we authorized the Commission to combine the renewal proceedings with the proceedings, on remand, for reconsideration of the award of the construction permit and the 4-month operating license, both to be conducted on a comparative basis assessing the public interest in the light of the absence of Mr. Choate. *Greater Boston Television Corp. v. FCC,* 118 U.S. App.D.C. 162, 334 F.2d 552 (1964).

B. *The Current Comparative Proceeding*

The consolidated comparative proceeding authorized by this court began in May 1964, and there was full presentation by WHDH and the other three applicants.

1. *Hearing Examiner's Decision*

On August 10, 1966, Hearing Examiner Herbert Sharfman issued an exhaustive Initial Decision, in favor of granting the renewal by WHDH. He concluded that the taint of Mr. Choate's activities had passed with his death, since none of the associates who might have been able to stop him were even aware, so far as the record shows, of the intention of the "imperious" Mr. Choate, and that an extension of disability on the part of WHDH would not be deterrent or prophylactic but only vengeful.

In the bulk of his conclusions, related to a comparison of the applicants, the Hearing Examiner took account of the evidence pertaining to the various criteria laid down in the Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (July 28, 1965):—past performance; diversity of ownership; integration of ownership and management; and program proposals. In determining the weight he felt appropriate under the circumstances of the case, the Examiner placed primary emphasis on the actual operating record of WHDH under the temporary authorizations of the preceding nine years.

The Examiner conceded that the position of WHDH was weak in regard to the integration criterion (participation in station management by owners), and that both BBI and Charles River were proposed by a distinguished and indeed "star-studded" group of civically active residents, offering strong claims on the score of area familiarity. The Examiner acknowledged that both BBI and Charles River proposed a diversity of excellent programs, though he offset this by noting that in the case of program proposals a new applicant enjoys a "literary advantage" over an existing operator. He further noted that the abbreviated nature of the WHDH tenure conferred by the Commission made it clear that WHDH was not entitled to a competitive advantage merely because it is a renewing station. Yet the Examiner concluded that it would be a sterile exercise to decide this case on the basis of the traditional methods of comparison of new applicants. In his view the dominant factor on balance was that the proven past record of good performance is a more reliable index of future operations in the public interest than mere promises of new applicants, which have no means of validation except as the criteria may be helpful in predicting ability to comply with proposals. The WHDH operating record was considered favorable on the whole, notwithstanding its unwillingness to grasp the nettle of some local

problems. As to diversification, the Examiner concluded that while the concentration of ownership of a Boston newspaper and other broadcast facilities would probably have ruled out the WHDH application if this were an all-initial license case, in this case the preference for WHDH on past record was not materially affected.[1] This, the Examiner felt, was in accordance with the Commission's long-standing policy in renewal proceedings, as established in *Hearst Radio, Inc. (WBAL)*, 16 F.C.C. 141 (1951).

2. *Commission's Decision of January 22, 1969*

On January 22, 1969, the Commission reversed the Hearing Examiner's decision, and entered an order denying the application of WHDH and granting that of BBI. 16 F.C.C. 2d 1. Its Decision reviewed the comparative merits of the applications.

Past Performance of WHDH: The Commission's Decision stated that the principles of the 1965 Policy Statement would be applied to the proceeding. Specifically it invoked the provision of its 1965 Policy Statement that an applicant's past record was to be given an affirmative preference only if it were outside the bounds of average performance. It read the Examiner's findings of fact as showing that the record of WHDH-TV was "favorable" on the whole—except for its failure to editorialize—but concluded that it was only within the bounds of average performance, and "does not demonstrate unusual attention to the public's needs or interests." 16 F.C.C. 2d at 10.

Diversification of Media of Mass Communications: WHDH's ownership by the Herald-Traveler resulted in an adverse factor on the diversification criterion. The Com-

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[1] The fourth applicant, Greater Boston Television Corp. (II), was disqualified for failing to surmount two preliminary (non-comparative) questions: it had not made an independent evaluation of the community's program needs, nor had it been able to secure its proposed antenna site.

mission stated that the desirability of maximizing the diffusion of control of the media of mass communications in Boston was highlighted by the incident wherein the Herald-Traveler prematurely published a preliminary draft of the report of the Massachusetts Crime Commission without also simultaneously publicizing the report over the broadcast station. It was brought out at the hearing that such a news broadcast would have impaired the story's "scoop" value for the Herald-Traveler.

The Commission further referred to the contention of WHDH that since it had never editorialized there existed a factor that minimized the charge of concentration of control. The Commission disagreed, stating that licensees have an obligation to devote reasonable broadcast time to controversial programs, and the failure to editorialize, if anything, demonstrated the wisdom of the Commission's policy for diversification of control of media of mass communications. On the factor of diversification, it concluded by awarding a substantial preference to both BBI and Charles River as against WHDH, and giving BBI a slight edge over Charles River (which also operates an FM radio station in Waltham, Massachusetts devoted to serious music).

Integration of Ownership with Management: The Commission affirmed the Examiner's conclusion that the applications of both Charles River and BBI reflect an integration—which in FCC parlance means integration of ownership with management—of substantially greater degree than WHDH, whose integration is small. It restated its view that the public interest is furthered through participation in operation by proprietors, as increasing the likelihood of greater sensitivity to an area's changing needs and programming to serve these needs.

As between Charles River and BBI, the Commission found that BBI rated a significant preference on integra-

tion (six of BBI's stockholders propose to serve as full-time management, two of whom have had significant television experience, as opposed to only one Charles River participating owner, whose experience was limited to radio).

Proposed Program Service: The Commission agreed that both BBI and Charles River proposed generally well-balanced program schedules, and concluded that neither proposal demonstrated such a substantial difference as to constitute a "superior devotion to public service." 16 F.C.C. 2d at 15.

The Commission assigned a slight demerit to BBI because of its insufficiently supported proposal for local live programs, for which it projected an extraordinary percentage of 36.3% of 160.5 hours of weekly programming. It adopted the findings of the Hearing Examiner that this was only a "brave generality" which generated the suspicion that it was flashed for its supposed value in a comparison.

The Commission assessed a slight demerit against Charles River in view of the fact that all its stock is owned by Charles River Civic Foundation, a charitable foundation complying with Section 503(c)(3) of the Internal Revenue Code. "Although Charles River proposes to editorialize, it is manifest that there are limitations on the amount of time that could be devoted to controversial questions which may be legislatively related, and that such limitations are not found in ordinary television station operations." 16 F.C.C. 2d at 17.[2]

The slight demerits assessed against BBI and Charles

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[2] The Commission was aware that applicant would be fully taxable, but took into account that the Internal Revenue Service might take the position that the parent's exemption would be lost if applicant did not comply with the Code provisions for tax-exempt organizations.

River on proposed program service were deemed to offset each other.

Other Factors: The Commission assessed a demerit against WHDH because of a failure to obtain the approval of the Commission on the transfer of de facto control when Choate was selected as president following the death of his predecessor, and when his death was followed by the accession of Akerson.[3] However, since there was no attempt at misrepresentation or concealment it was concluded that the circumstances did not reflect so adversely on character qualifications as to warrant the absolute disqualification of WHDH.

The Commission's Vote: The Commission voted to grant the application of BBI. Its Decision was written by Commissioner Bartley, who was joined by Commissioner Wadsworth. Three commissioners did not participate in the decision (Hyde, Cox and Rex Lee). Commissioner Johnson concurred, with a statement indicating his strong opposition to the application of WHDH, and noting that this was supported not only by diversity of media, but also by the "healthy" result of having at least one network-affiliated VHF television station that is independently and locally owned. "I feel no passion," he remarked, about the choice between BBI and Charles River, and stated that

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[3] The Commission approved the Hearing Examiner's conclusion that this was a transfer of control under § 310 of the Communication Act in view of the "peculiar but not unique situation of the Herald-Traveler in which *management* (the president) is in actual control." 16 F.C.C. 2d at 17. However, in view of the lack of Commission precedent the Examiner deemed it unfair to hold WHDH accountable for failure to realize the "transfusion of ichor" required FCC approval. The Commission disagreed, its conclusion (as refined on reconsideration) being that there was a duty to obtain the approval of the FCC. The Commission also added that licensees had been instructed to proceed in any case of uncertainty by bringing the facts to the Commission's attention, for a determination whether Commission approval is required.

while normally he would not participate in a case that essentially involved a reconsideration of matters that arose before he became a a member of the FCC—"In this instance, however, my participation is necessary to constitute a working majority for decision. Accordingly, I concur in today's decision." 16 F.C.C. 2d at 27. Commissioner Robert Lee dissented, voting to grant the application of WHDH, and abstaining from any choice as between BBI and Charles River.

3. *The Commission's Action on Reconsideration*

Reaction to the Commission's decision was swift. One distinguished commentator characterized it as a "spasmodic lurch toward 'the left'."[4] The television industry began organizing its forces to seek legislative reversal of what seemed to be a Commission policy, reversing *Hearst,* that placed all license holders on equal footing with new applicants every time their three-year licenses came up for renewal. On May 19, 1969, the Commission adopted a separate Memorandum Opinion and Order on the petitions of all parties for a rehearing. 17 F.C.C.2d 856.

While the Commission granted in part the petition for reconsideration by WHDH essentially its second opinion restated and reinforced the views stated in the Decision. It may be useful to mention the explication put forward, as it happens in response to exceptions by the favored applicant (BBI), which urged that the FCC state explicitly that its decision did not reaffirm the earlier grant to WHDH. BBI sought clarification of the status of WHDH as an applicant for initial license, rather than for renewal of license. Instead the FCC recited that WHDH's application was treated as one for the renewal of its license, and explicitly adopted the Examiner's conclusion that modification of the FCC's 1962 decision (granting a 4-month license) would not serve the public

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[4] Jaffe, *WHDH: The FCC and Broadcasting License Renewals.* 83 HARV. L. REV. 1693, 1700 (1969).

interest, that no change in that ruling was required as a result of Choate's death, and that reevaluation of the original record would be contrary to the public interest best served by terminating this lengthened proceeding.

The Commission added a closing paragraph to clarify that this was not an ordinary renewal case since "unique events and procedures . . . place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." The FCC noted that WHDH's operation, although conducted some 12 years, has been for the most part under temporary authorizations. It did not receive a license to operate a TV station until September 1962, and then for only 4 months, because of the Commission's concern with the "inroads made by WHDH upon the rules governing fair and orderly adjudication." And in the renewal proceeding the FCC expressly ordered that new applications could be filed for a specified 2-month period, which was done and a proceeding held thereon.

4. *Subsequent Developments*

While the Commission's decision was on appeal to this court, the legislative pressure continued to build. A bill, introduced by Senator Pastore, Chairman of the Communications Subcommittee of the Senate Commerce Committee, proposed to require a two hearing procedure, wherein the issue of renewal would be determined prior to and to the exclusion of the evaluation of new applications.[5] On January 15, 1970, the Commission issued a new Policy Statement, which, while retaining the single hearing approach, provided that the renewal issue would be determined first, in a proceeding in which new applicants

[5] S. 2004, 91st Cong., 1st Sess. (1969) was sponsored by 22 Senators and 18 Representatives.

would be able to appear to the extent of calling attention to the license holder's failings. 22 F.C.C. 2d 424. Only upon a refusal to renew would full comparative hearings be held.

The Policy Statement set forth that a licensee with a record of "solid, substantial service" to the community, without serious deficiencies, would be entitled to renewal notwithstanding promise of superior performance by a new applicant. This was said to provide predictability and stability of broadcast operations, yet to retain the competitive spur since broadcasters will wish to ensure that their service is so "substantial" as to avoid the need for comparative proceedings.

The Commission expressly stated that its policy statement "is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." 22 F.C.C. 2d at 430. In such case the license holder cannot obviate the comparative analysis called for by the established Policy Statement, 1 F.C.C. 2d 393 (1965).

II. *THE ISSUES ON APPEAL*

A. *General Conformance of Agency Disposition to Salient Principles of Rule of Law*

We have presented at some length and detail the Commission's proceedings and disposition because we have given particular consideration to the Commission's procedures, findings and reasons, in this case, in order to assure ourselves that the decision on appeal satisfies the basic requirements of the Rule of Law, as established by Administrative Law doctrine. That is always the court's task, but it is one discharged with vigilance in a case like this, where the administrative process was at one time blemished by *ex parte* contacts with agency

heads.[6] Our alertness was also prompted in this case by the circumstance first that the agency rejected the result reached by its Hearing Examiner, and, further, that it was manifestly in a state of flux and evolution of its approach to the kind of issue presented by this proceeding.

Approaching this case as we have with full awareness of and responsiveness to the court's "supervisory" function in review of agency decisions,[7] it may be appropriate to take note of the salient aspects of that review. It begins at the threshold, with enforcement of the requirement of reasonable procedure, with fair notice and opportunity to the parties to present their case.[8] It continues into examination of the evidence and agency's findings of facts, for the court must be satisfied that the agency's evidentiary fact findings are supported by substantial evidence,[9] and provide rational support for the agency's inferences of ultimate fact.[10] Full allowance must be given not only for the opportunity of the agency, or at least its examiners, to observe the demeanor of the witnesses, but also for the reality that agency matters typically involve a kind of expertise—sometimes technical in a scientific sense, sometimes more a matter of specialization in kinds of regulatory programs. Expert discretion is secured,

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[6] Jacksonville Broadcasting Corp. v. FCC, 121 U.S.App. D.C. 69, 348 F.2d 75, *cert. denied*, 382 U.S. 893 (1965).

[7] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589 (1965).

[8] Goldberg v. Kelly, 397 U.S. 254 (1970); Greene v. McElroy, 360 U.S. 474 (1959); Radio Athens, Inc. v. FCC, 130 U.S.App.D.C. 333, 401 F.2d 398 (1968).

[9] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

[10] City of Chicago v. FPC, 128 U.S.App.D.C. 107, 115, 385 F.2d 629, 637 (1967), *cert. denied*, 390 U.S. 945 (1968).

not crippled, by the requirements for substantial evidence, findings and reasoned analysis. Expertise is strengthened in its proper role as the servant of government when it is denied the opportunity to "become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines v. United States,* 371 U.S. 156, 167 (1962). A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.[11] "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *Volkswagenwerk* v. *FMC,* 390 U.S. 261, 272 (1968).

Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments, but also to select the policies deemed in the public interest. The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues.[12] This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards,

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[11] Los Angeles v. FMC, 128 U.S.App.D.C. 156, 159, 385 F.2d 678, 681 (1967).

[12] Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968); City of Pittsburgh v. FPC, 99 U.S.App.D.C. 113, 237 F.2d 741 (1956); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966).

applied without unreasonable discrimination.[13] As for the particular subject of comparative hearings, the findings must cover all the substantial differences between the applicants and the ultimate conclusion must be based on a composite consideration of the findings as to each applicant.[14]

Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems,[15] and has not genuinely engaged in reasoned decision-making. If the agency has not shirked this fundamental task, however, the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. Nor will the court upset a decision because of errors that are not material, there being room for the doctrine of harmless error.[16] If satisfied that the agency has taken a hard look at the issues with the use of

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[13] WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 320, 418 F.2d 1153, 1156 (1969); City of Chicago v. FPC, 128 U.S.App. D.C. 107, 385 F.2d 629 (1967), *cert. denied,* 390 U.S. 945 (1968).

[14] Johnston Broadcasting Co. v. FCC, 85 U.S.App.D.C. 40, 46, 175 F.2d 351, 357 (1949).

[15] WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 418 F.2d 1153 (1969); Pikes Peak Broadcasting Co. v. FCC, —— U.S. App.D.C. ——, 422 F.2d 671, *cert. denied,* 395 U.S. 979 (1969).

[16] Braniff Airways v. CAB, 126 U.S.App.D.C. 399, 411-14, 379 F.2d 453, 465-68 (1967). The doctrine must be used gingerly, if at all, when basic procedural rights are at stake. Yiu Fong Cheung v. INS, 135 U.S.App.D.C. 244, 248, 418 F.2d 460, 464 (1969).

reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned,[17] though of course the court must not be left to guess as to the agency's findings or reasons.[18]

The process thus combines judicial supervision with a salutary principle of judicial restraint,[19] an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest,[20] and are "collaborative instrumentalities of justice."[21] The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance. This collaborative spirit does not undercut, it rather underlines the court's rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal.[22] Reasoned decision promotes results in

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[17] Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945); WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 320, 418 F.2d 1153, 1156 (1969); Pikes Peak Broadcasting Co. v. FCC, —— U.S.App.D.C. ——, 422 F.2d 671, *cert. denied*, 395 U.S. 979 (1969).

[18] Radio Station KFH Co. v. FCC, 101 U.S.App.D.C. 164, 247 F.2d 570 (1957).

[19] Braniff Airways v. CAB, 126 U.S.App.D.C. 399, 379 F.2d 453 (1967); WAIT Radio v. FCC, 135 U.S.App.D.C. 317, 320, 418 F.2d 1153, 1156 (1969).

[20] Niagara Mohawk Power Corp. v. FPC, 126 U.S.App.D.C. 376, 383 n.24, 379 F.2d 153, 160 n.24 (1967).

[21] United States v. Morgan, 313 U.S. 409, 422 (1941).

[22] City of Chicago v. FPC, 128 U.S.App.D.C. 107, 116, 122, 385 F.2d 629, 638, 644 (1967); Am-Chi Restaurant, Inc. v. Simonson, 130 U.S.App.D.C. 37, 38, 396 F.2d 686, 687 (1968); Proctor v. Hackers' Board, ——A.2d —— (D.C. Ct. App., July 28, 1970).

the public interest by requiring the agency to focus on the values served by its decision,[23] and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers.

There was once a day when a court upheld the "sensible judgments" of a board, say of tax assessors, on the ground that they "express an intuition of experience which outruns analysis."[24] There may still exist narrow areas where this approach persists, partly for historic reasons.

Generally, however, the applicable doctrine that has evolved with the enormous growth and significance of administrative determination in the past forty or fifty years has insisted on reasoned decision-making. The requirement of reasoned decision-making is under great tension when a certificating agency is required to choose between two or more applicants endowed with virtually equivalent qualifications. But at least so long as the government uses the forms of adjudication, and does not turn, *e.g.* to bidding, or even chance, as the most feasible guarantor of neutral and acceptable selection,[25] reasoned decision-making remains a requirement of our law.

Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of

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[23] Joseph v. FCC, 131 U.S.App.D.C. 207, 211, 404 F.2d 207, 211 (1968).

[24] Chicago B. & Q. Ry. v. Babcock, 204 U.S. 585, 598 (1907).

[25] Some instances of a principled use of luck, with ground rules known in advance, are cited in Star Television, Inc. v. FCC, 135 U.S.App.D.C. 71, 80 n.18, 416 F.2d 1086, 1095 n.18 (dissenting opinion), *cert. denied,* 396 U.S. 888 (1969).

what is in the public interest may change,[26] either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored,[27] and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.[28]

The net result of our study and reflection in this case is our conclusion that the record findings and opinions before us, while not without problems, reveal in essence that the Commission has been diligent to take a hard look at the problem areas, and to set forth with clarity grounds of reasoned decision which we think permissible.

It merits interjection that the shape of the agency's disposition was aided in no small measure by the Initial Decision of the Hearing Examiner, and the Examiner's careful and indeed exhaustive review of the evidence and issues, and comparisons of the applicants in regard to each of the pertinent criteria. It does not decry the significance and value of the Examiner's efforts that the Commission disagreed with his decision and with several of his conclusions; indeed, it attests to his care that his decision was useful although the conclusion was reversed.

The Examiner's decision is part of the record, and the

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[26] City of Chicago v. FPC, 128 U.S.App.D.C. 107, 115, 385 F.2d 629, 637 (1967), *cert. denied*, 390 U.S. 945 (1968); Pinellas Broadcasting Co. v. FCC, 97 U.S.App.D.C. 236, 238, 230 F.2d 204, 206, *cert. denied*, 350 U.S. 1007 (1956).

[27] New Castle County Airport Comm'n. v. CAB, 125 U.S. App.D.C. 268, 270, 371 F.2d 733, 735 (1966), *cert. denied*, 387 U.S. 930 (1967)

[28] Marine Space Enclosures, Inc. v. FMC, —— U.S.App.D.C. ——, 420 F.2d 577, 585 (1969); WAIT Radio v. FCC, 135 U.S. App. D.C. 317, 321, 418 F.2d 1153, 1157 (1969).

record must be considered as a whole in order to see whether the result is supported by substantial evidence.[29] The agency's departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision.[30] Yet in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs.[31] Here, the Commission accepted the Examiner's findings and conclusions to a substantial degree; and when it did not, the Commission made clear not only its awareness of what the Examiner had concluded, but also its reasons for taking a different course.

The court's conclusion as to the general scope and character of the agency's findings and reasoned decision provides prologue and perspective for the discussion of the particular contentions raised by appellants.

B. *Issues Posed by Appellant WHDH, Inc.*

1. *Contention that WHDH Was Entitled to Same Consideration As Renewal Licensee*

WHDH's central contention rests on its 4-month operating license, duly granted by the Commission[32] in 1962, and

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[29] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[30] American Fed. of Television & Radio Artists v. NLRB, 129 U.S.App.D.C. 399, 405, 395 F.2d 622, 628 (1968); Retail Store Employees Union v. NLRB, 123 U.S.App.D.C. 360, 360 F.2d 494 (1965).

[31] Oil, Chemical & Atomic Workers v. NLRB, 124 U.S.App. D.C. 113, 116, 362 F.2d 943, 946 (1966); Lorain Journal Co. v. FCC, 122 U.S.App.D.C. 127, 131, 351 F.2d 824, 828 (1965), *cert. denied*, 383 U.S. 967 (1966).

[32] The Examiner put it that WHDH recognized that "it

the Commission's determination, in the decision before us on this appeal, to adhere to the grant of the original application of WHDH to that extent.

WHDH makes no serious contention that it could protest the grant to intervenor BBI if the Commission proceeded validly in comparing these applications by the criteria used by the Commission for appraisal of new applicants for facilities. On that basis it is undeniable that a strong preference would be available to BBI in view of the "integration" and "diversity" criteria. WHDH objects that such preferences were set forth by the 1965 Policy Statement governing comparative hearings involving new applications for new facilities, and are not properly available in a renewal proceeding. It was by application of the criteria generally used for renewal proceedings that the Examiner entered a decision in favor of WHDH. The failure of the Commission to apply renewal criteria is the core of the WHDH appeal.

The application of the criteria in the 1965 Policy Statement is said to impose an unlawful forfeiture on WHDH amounting to a denial of due process, and to constitute an improper refusal to honor the established policy of promoting broadcast license stability.

There is no doubt that the Commission applied to this proceeding, although it is a renewal proceeding, the same criteria that it normally applies for hearing new applicants for facilities. The effect of that determination was to give WHDH no predicate for renewal on the basis of a sound or "favorable" record in its license operation, and to hold that only an exceptional record would warrant special consideration (since all applicants would be presumed to offer a normal range of operation).

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would be unlikely to prevail under the conventional criteria." 16 F.C.C. 2d at 229, para 721.

If the case were before us solely on the Decision adopted by the Commission on January 22, 1969—susceptible of the construction that the 1965 Policy Statement was applicable to all renewal proceedings--we would be presented with a different question. While the "forfeiture" terminology invoked by WHDH may be more of a conclusion than a reason, and while this statute does not reflect the same concern for "security of certificate" that appears in other laws, *cf. CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 n.6, 324-25 (1961), there would be a question whether the Commission had unlawfully interfered with legitimate renewal expectancies implicit in the structure of the Act. In addition, a question would arise whether administrative discretion to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards—a contention that may have increased significance if First Amendment problems are presented on renewal application by a newspaper affiliate, including the possibility that TV proceedings may come to involve overview of newspaper operations. Those problems are magnified if a licensee on the one hand may avoid comparison only by maintaining extraordinary performance, and on the other hand court disaster, in the event of comparison, by virtue of the diversity policy, whether expressed in a formal demerit or some inchoate burden.

Fortunately, the present posture of this case permits us to refer to these problems as matters that are not involved in our decision. The Commission's opinion of May 19, 1969, entered on reconsideration, expressly puts this case in a special and unique category because of the past history of WHDH.[33]

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[33] The Commission said (par. 40):

> In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an

This interpretation of its action is underscored by the 1970 Policy Statement on Comparative Hearings Involving Renewal Applicants.[34] This Statement in essence carries forward the general policy on renewals expressed in *Hearst Radio, Inc. (WBAL)*, 15 F.C.C. 1149 (1951), on which WHDH places substantial reliance. The Commission's 1970 statement puts its policy thus (see 22 F.C.C. 2d at 425):

> [I]f the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted.

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applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the "* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * * ." Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license.

[34] 22 F.C.C. 2d 424 (1970).

> His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.

The permissibility of the general policy continued by this Statement is not in issue since that is not challenged, if anything it is relied on, by WHDH. Assuming its validity, the Commission's failure to apply the policy to WHDH is not error.

The Commission's 1970 Policy Statement carries a proviso, set forth in the footnote,[35] indicating that it is inapplicable to "those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." In such cases the applicant's record will be examined, but subject to the comparative analysis called for by the 1965 Policy Statement.

We think the distinction drawn by the Commission, in both this case and the 1970 statement, providing for special consideration of certain renewal applicants, as in remand cases, as if they were new applicants, to be reasonable both generally and in its application to the case before us.

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[35] "The policy statement is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant. In such cases, while the past record, favorable or unfavorable, is of course pertinent and should be examined, the *WBAL* policy, as here amplified, is inapplicable; a good record without serious deficiencies will not be controlling in such cases so as to obviate the comparative analysis called for in the 'Policy Statement on Comparative Broadcast Hearings,' 1 F.C.C. 2d 393 (1965)." 22 F.C.C. 2d at 430.

We have re-examined the Commission docket which was before us in 1963, when we remanded for further proceedings. The Commission's action was based on its critical decision of July 14, 1960, where it reviewed the record and concluded that Robert Choate, who was the principal officer of WHDH, had "demonstrated an attempted pattern of influence." [36]

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[36] *See* 29 F.C.C. 204, at 211-212:

> 5. However, we do conclude that Choate demonstrated an attempted pattern of influence. He indicates that his reason for the initial meeting with McConnaughey was to "size up" the new Chairman but, accepting that as true as far as it goes, it does not appear to be a full disclosure of his motives. While the Herald-Traveler had a legitimate interest in the views of the new Chairman of the agency regulating its radio station and the television station it soon hoped to have, in the normal course of events its contacts with the Commission would be conducted through its professional representatives and its appraisal of the individual Commissioners would be formulated from the opinions of these gentlemen. The record contains no persuasive explanation of why Choate felt it necessary to seek a personal relationship with McConnaughey, and we conclude that his reason was to afford the Chairman an opportunity to "size him up"; that is, to demonstrate by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest.
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> 6. This view of Choate's motive in arranging the first luncheon is buttressed by the fact of the second luncheon and its admitted purpose of providing an opportunity to present McConnaughey with a brief on the Dempsey amendment. While WHDH undoubtedly had a right to express its views to the Commission on communications legislation concerning it, its attempted method of presentation must be judged in the light of the circumstances then prevailing. It could not have escaped Choate's attention that the subject of the legislation was an

Thus the Commission superseded the September 23, 1959 decision of Special Hearing Examiner Stern, 18 R.R. 1101, who had concluded that the activities of Choate were not such as to render the construction permit to WHDH either void or voidable. Justice Stern reasoned that Choate was visiting Chairman McConnaughey not in his adjudicative role but as one who had been a hostile

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important issue in the pending adjudicatory proceeding, nor could he have believed that McConnaughey might read such a brief without perceiving the pertinence of its arguments to the disposition of the Boston case. If he felt it necessary to present such a brief to the Commission at that time, he must be presumed to have been aware of the relevance of the brief to the pending case, and, if he wished to escape the stigma of ex parte representation, the presentation should have been in such form as would afford his opponents an opportunity to make such reply as they might deem appropriate. Further, there is no persuasive explanation of why Choate, who is not shown to be a specialist in communications law, should consider himself, rather than the draftsman of the proposed legislation or some other experienced counsel, to be the proper person to present a brief on so technical and complex a subject. That McConnaughey did not accept and, therefore, could not have been influenced by the brief is irrelevant to the fact that Choate attempted, in effect to influence the outcome of the case by presenting argument on a portion thereof to a member of the Commission ex parte.

7. The very attempt to establish such a pattern of influence does violence to the integrity of the Commission's processes. Such an attack on the integrity of the processes of any adjudicatory body brings into play its inherent right to protect such processes, and one of the remedial measures available is its discretion in the voiding of any previous action that may have been tainted by such attempt. The facts revealed on this record persuade us that the Commission's processes can best be protected in this instance by exercising our discretion to void the grant to WHDH.

witness before a legislative committee, and "did not make any culpable attempt to influence his vote in the Channel 5 proceedings." Nor was such effort made on any of the occasions when Choate had casual social contacts, as at lunches and receptions, with the Commissioners. Justice Stern interpolated that social relations with public officials are not taboo, for they are not required to live in ivory towers, so long as no "marked attention or unusual hospitality" is involved. And Justice Stern reiterated in strongest terms that there was no attempt on the part of Choate to present the merits of the Herald's application or its organization, nothing that could justifiably be regarded as impairing the propriety of the award made.

The Commission took a different view. The matter is important enough that we have set out its findings (see note 36), to let them speak for themselves. The essence of the matter is that the Commission discerned that although Choate did not in terms refer to his application, his purpose was not to size up the Chairman as much as to let the Chairman size him up—"to demonstrate by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application."

The fabric of Administrative Law, stiffened with Justice Stern's own eloquence in another proceeding, establishes the discretion available on principles of fairplay to take appropriate action when parties seek to influence the results of a proceeding by factors not a part of the hearing record. *WKAT, Inc.* v. *FCC,* 111 U.S.App.D.C. 253, 260, 296 F.2d 375, 382, *cert. denied,* 368 U.S. 841 (1961). Although in the present case, unlike others, this Examiner perceived no misconduct, that issue, and the assessment of the seriousness of the misconduct, involves the judgment and discretion of the Commission. The Commission—wise in the ways of the administrative world—must be given reasonable latitude in its efforts to keep its processes free of taint. The

Commission was within the range of its discretion when it found misconduct, for the fact that Choate's effort was low key did not render it less significant, or less likely to be successful. The Commission was within the range of sound discretion when it decided to take remedial measures because the "attempt to establish such a pattern of influence does violence to the integrity of the Commission's processes." 29 F.C.C. at 212.

There is no chart that can forecast the flow and pace of sound administrative discretion, and hence there is always some possibility of surprise. The same might be said of stiffenings and relaxations of sentencing policy that pulse through the courts, often long after the crimes. Discretion is particularly broad when an agency is concerned with fashioning remedies and setting enforcement policy. *Consolo v. FMC,* 383 U.S. 607 (1966); *WOKO, Inc. v. FCC,* 71 U.S.App.D.C. 228, 109 F.2d 665 (1939). The burden of establishing a claim of illegality is a heavy one, and WHDH cannot successfully contend that the judicial conscience must be shocked by what the Commission has done.

The Commission stayed within the range of sound discretion when it adopted, as successive remedial measures, voiding the original grant to WHDH (though not void ab initio); remanding for a comparative reevaluation of the original applicants; confining the grant given to WHDH as the better of the original applicants to a mere 4-month operating license; providing for a reopening period of two months, in order to permit a comparative evaluation with new applicants proposing to serve the public interest.

While the precise nature of the forthcoming comparative evaluation was not spelled out in detail, WHDH certainly has no basis for suggesting it had an assurance of being treated by the same criteria as those generally accorded to renewal applicants.

If anything turned on this we would have to recognize that WHDH was not expressly informed in advance that the comparison between WHDH and its rivals was to be conducted by reference to the criteria normally used for a new application devoid of any elements of renewal. But this did not affect the range of proof which any party might tender or contest. Although the 1965 Policy Statement did not purport to deal with the problems raised by renewal applications the Commission concluded in the same year that the policy statement properly governed the nature and scope of evidence contemplated for renewal proceedings. *Seven (7) League Productions, Inc.* (*WIII*), 1 F.C.C. 2d 1597, 1598 (1965). Each applicant was aware that its task was to make the best case possible on the basis of program offering, integration, diversification, past performance and any other matters the parties asked the Commission to consider as pertaining to licensee fitness. As the Hearing Examiner noted, all the applicants were given the fullest opportunity to display their advantages. It is certainly not uncommon for a contender to be called on to put forward all the factors he deems favorable though he cannot be confident what absolute or relative weights will be accorded by those charged with appraisal and judgment.

There being no impediment in the content or shape of the record due to lack of fair notice, certainly we cannot say the Commission was unreasonable when in the last analysis it used the tainted overtures of WHDH as a reason for fresh consideration of all applicants, without any special advantage to WHDH by virtue of its operation under lawful but temporary authority. This is what the law seeks to ensure whenever selection of a contender must be made after a hearing, although one of the applicants has been given temporary authority, either without a hearing at all because of emergency,[37] or after a proceed-

[37] Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334,

ing subject to a defect. *Braniff Airways* v. *CAB*, 126 U.S. App.D.C. 399, 379 F.2d 453 (1967).

The complaint of WHDH must be appraised in the light of the courses available to the Commission for coping with the problem presented by the activities of Mr. Choate. At one extreme, the Commission was being asked (by Greater Boston) to take it into account to such extent as would in effect impose an absolute disqualification; this it did not do.

WHDH in effect suggests the other extreme—a brushing aside of the entire matter on the ground that the offending officer is no longer involved, and the corporation has not profited by his delict. The Examiner used this conception on the ground that no reason for deterrence could apply to the unimplicated officers presently managing the station. But the policy of deterrence may have a broader significance. It may take into account that an officer might well be willing to try his hand at an impropriety if all that is involved is a calculated risk as to his own position (which would be enormously enhanced if he is successful), whereas he would possibly be deterred if he realized that his mal-adventure, if discovered, would be costly to the friends and associates who had invested in the enterprise.

In between these extremes are possibilities like a comparative hearing with a demerit assigned to WHDH; that was done by the Commission in its Decision of September 25, 1962, which, however, left the Commission with the conviction that while it would still make a grant to WHDH, a customary 3-year grant was not in the public interest.

The Commission's action in exposing WHDH to another public hearing with new applicants, a hearing scheduled

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338 (1st Cir. 1953); Pennsylvania Gas and Water Co. v. FPC, —— U.S. App. D.C. ——, —— F.2d —— (No. 23,051, March 19, 1970).

soon after the date of its order, is a disadvantage from the viewpoint of WHDH, but we cannot say it was contrary to the public interest. After this court's remand, to take account of Choate's death, the Commission set a course that retained its order for a hearing with new applicants, but avoided a specific demerit for WHDH in that comparative consideration. This was preferable to an approach wherein a demerit would be inserted into the comparison with new applicants, preferable both for WHDH and, it would seem, for the public interest.[38] WHDH insists, however, on an approach which would give it all the rights and expectancies of an ordinary renewal applicant. In the ordinary case such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. This position does not fairly characterize the situation of a licensee which, by virtue of its officer's impropriety, has been given only temporary operating authority of one kind or another (including the 4-month license). This was the conclusion of both the Hearing Examiner and the Commission (as refined on reconsideration), and we think it within the range of reasonable discretion.

The determination that in certain cases a renewal application must be conducted on the basis of a new comparative consideration is not necessarily a "punishment" for wrongdoing. The same result may follow even where the

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[38] When an applicant is required to bear a demerit assigned for non-comparative reasons, the public may wind up being denied the services of a superior broadcaster. Where that demerit is not necessary for deterrent reasons, it would seem counterproductive. As to the final comparative hearing the blend of deterrence and public interest in selecting the broadcaster was accomplished by requiring WHDH to face a de novo comparative hearing, but without a continuing demerit.

ineptitude and errors of the Commission may be more to blame than the licensee for the state of affairs precipitating that result.[39] The central consideration is that there is a special class of cases where this method of reaching the optimum decision in the public interest may be fairly invoked without undercutting whatever expectancies may attach in general to licensees seeking renewal.

The Commission's action in pitting WHDH against its rivals for fresh comparative consideration is not negatived by its insistence on its 1962 issuance, preserved in its 1969 decisions, of a license. Presumably, the use of a 4-month license rather than some other kind of temporary operating authority reflected practical, procedural considerations. *Compare WKAT, Inc.* v. *FCC,* 111 U.S.App.D.C. 253, 261, 296 F.2d 375, 383, *cert. denied,* 368 U.S. 841 (1961). The Commission may have thought the 4-month license would be preferable as serving to finalize the proceeding, so far as the then-operative rival was concerned, though this was later undercut by this court's remand. The 4-month license did not operate to make WHDH a conventional applicant for renewal, and that is the core of its position in this court.

The Commission did not try, as WHDH suggests, to erase the operating record and experience of WHDH and its principals. In effect what it did was to hold WHDH to a higher comparative standard than that required of renewal applicants generally in order to be able to invoke a past record as a reason for rejecting the promise of better public service by new applicants. The Hearing

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[39] *Cf.* Office of Communications of The United Church of Christ v. FCC, —— U.S. App. D.C. ——, 425 F.2d 543 (1969), especially at 551, for statement of Judges McGowan and Tamm, who along with Judge Burger, were on original panel, accompanying their vote to deny FCC petition for rehearing *en banc.*

Examiner considered that a good record of past performance was a more reliable indicator of public service than glowing promise. The Examiner was not as impressed as the Commission by the reliability of its criteria as indicators validating the likelihood of performance. Also, he does not seem to have taken into account the problem that his approach provided in effect a "built-in-lead" from actual operation, although he disclaimed any right of WHDH to a privileged position as an applicant for renewal. The Commission, on the other hand, was more concerned with keeping the parties as close as possible to a new application situation, without undue advantage acquired from the physical fact of operation under a temporary authorization.

We think the course adopted by the Commission cannot be considered as arbitrary or unreasonable, or as in violation of legislative mandate. The remedies fashioned through the exercise of its discretion are not without an element of novelty. "In the evolution of the law of remedies some things are bound to happen for the 'first time.'" *International Bhd. of Operative Potters v. NLRB,* 116 U.S.App.D.C. 35, 39, 320 F.2d 757, 761 (1963). Hand crafted orders and procedures are particularly appropriate for unique fact situations. On the unique facts presented, WHDH was neither a new applicant nor a renewal applicant as those terms are generally construed. Since these orthodox classifications, and the rules generally pertaining to each, were not meaningfully available to the Commission on these facts, that body soundly formulated an intermediate position for the instant case. There was no error.

2. *Other Issues*

The other issues raised by WHDH do not require reversal. It was rated inferior to its rivals on the diversification and integration criteria.

a. *Diversification of Controls of Media of Mass Communications*

The Commission assigns a preference to Diversification of Control of the Media of Mass Communications. Plainly the Commission does not exceed its powers in seeking to avoid rather than foster a concentration of control of the sources of news and opinions.[40]

The need for diversity, and the danger of concentration, is not as great in Boston as in smaller markets. That consideration apparently contributed to the Commission's original 1957 decision, and again its 1962 decision, following a comparative hearing, to prefer WHDH to its then rival. That the diversity criterion was prominent in the 1969 rejection of WHDH does not necessarily indicate that the Commission's standards changed. It is merely another aspect of the situation that after 1963 WHDH was confronted with more effective competitors then previously. It is ironical rather than unjust that the efforts of WHDH establishing the availability of profits may have stimulated the new applications.

We take note, as WHDH requests, of the *Red Lion* decision, which approves the FCC's policy of requiring licensees, under the "fairness" doctrine, to provide a voice to more than one side of important controversial issues. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969). We do not agree that *Red Lion* has, as WHDH put it, "pulled the rug from under the pretentious Policy Statement justification of its 'diversity' criterion." The point is more soundly put by saying that the importance of avoiding concentration of control in communication is

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[40] McClatchy Broadcasting Co. v. FCC, 99 U.S.App.D.C. 195, 239 F.2d 15 (1956), *cert. denied,* 353 U.S. 918 (1957); Scripps-Howard Radio, Inc. v. FCC, 89 U.S.App.D.C. 13, 189 F.2d 677, *cert. denied,* 342 U.S. 830 (1951).

such an important objective that the Commission must be accorded discretion in choice of measures for its fulfillment. *Philadelphia TV Broadcasting Co. v. FCC,* 123 U.S. App.D.C. 298, 359 F.2d 282 (1966).

The Commission need not be confined to the technique of exercising regulatory surveillance to assure that licensees will discharge duties imposed on them, perhaps grudgingly and perhaps to the minimum required. It may also seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint.

Further, as the Commission pointed out, its concept of the public interest contemplated initiating of editorials by licensees. This embraces selection of topics for probing, and emphasis given to topics, as well as fairness in presentation of views on each topic. There is a public interest in diversity in policy areas lit by the lantern of editorial probes, and for that matter by reportorial assignments and coverage.

WHDH complained it was wrongfully penalized for failure to editorialize. And it can readily be discerned that aggressive editorializing by WHDH would have provided its rivals with ammunition. This does not undermine the Commission's opinion; it rather underlines the inherent difficulty confronting the affiliate of a newspaper, at least one seeking a new license.

Some aspects of the Commission's discussion are more bothersome. Thus the Commission discussed an instance in which WHDH delayed relay of a story published in the Herald-Traveler as a "scoop"— a preliminary account of a report of the Massachusetts Crime Commission. The Examiner disclaimed "competence to assess any blame because the Herald-Traveler chose to disclose the draft, a printed document, in its natural medium, print, rather than

perhaps weaken its effect by publicizing it orally." 16 F.C.C. 2d at 92. This observation is not without merit, and we do not see why the Commission should have pursued this instance if its purpose was only, as it said, to highlight the importance of the diversification criterion. We do not pursue the point further for even assuming error its impact in overall context was minimal rather than substantial.

b. *Transfer of De Facto Control*

The Commission imposed a comparative demerit against WHDH for failure to report changes of de facto control of the licensee with the change of presidency. The Commission, like the Examiner, found that in this particular situation this amounted to a transfer of actual control and management of corporate affairs. The Examiner reached the same conclusion, but thought it warranted no consideration because of lack of precedent explicity requiring the report.

The problem is not without difficulty. On the one hand there is need to report transfers of actual control and the Commission has a discretion as to appropriate remedies. *Lorain Journal Co. v. FCC,* 122 U.S.App.D.C. 127, 132, 351 F.2d 824, 829 (1965), *cert. denied,* 383 U.S. 967 (1966). As there noted, the Commission has warned that in case of doubt licensees may seek appropriate advice of the Commission. And here the Commission did not assert a disqualification, in view of the fact that there was no misrepresentation or concealment by WHDH, but only assigned a demerit. Yet a demerit that loses a license is bitter tea. And the use of a sweeping rather than a more refined administrative remedy may, at least in some instances, represent an improvident use of administrative discretion, in the absence of stated justification. *Burlington Truck Lines v. United States,* 371 U.S. 156, 173-74 (1962).

The difficulty of the issue is sharpened by prickly

questions of notice and reasonableness of remedy, notwithstanding the wide discretion reserved to the Commission. However, there is doctrine supporting the Commission's action, at least prima facie. Taking into account the status of WHDH as in effect an applicant for a new license, and having in mind the essentially cumulative nature of this demerit, we think the interest of justice would not be served by refinement of the issues in the case at bar.

C. *Issues Raised by Charles River*

1. *The Voting Question*

Charles River presents a subtle, technical contention which is deftly stated but proves on analysis to reduce itself to this, that on the selection of BBI over Charles River a quorum was lacking since there were four abstentions (three Commissioners abstaining completely, and Commissioner Robert Lee who voted for WHDH, abstaining from a choice as between the two new applicants), and that Commissioner Johnson recorded no great enthusiasm for BBI over Charles River.

The short answer is that four out of seven Commissioners constitutes a quorum; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present;[41] and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI.

Even assuming that Commissioner Johnson voted for BBI solely in order to avoid an impasse and to provide an effective order, that is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality. Government often involves the choice of the feasible, and the selection of the

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[41] WIBC, Inc. v. FCC, 104 U.S.App.D.C. 126, 259 F.2d 941, *cert. denied*, 358 U.S. 920 (1958).

least undesirable alternative. It is accepted judicial practice for a judge to cast a vote, at least assuming no violation of conscience is involved, in order to avoid an impasse and secure a legally effective mandate for the court.[42] We also note that when this point was raised in the application of Charles River for reconsideration, Commissioner Johnson expressed no reservation in voting to deny that application and uphold the grant to BBI.

2. *Comparative Consideration*

In terms of comparative consideration the choice between Charles River and BBI is closer than the issue whether to retain WHDH. In the last analysis, the Commission's order turns on the criterion of integration, of full-time participation in station operation by owners. Charles River's appeal is based on the fact that BBI's is only a paper claim.

The Commission's conclusion is not necessarily undercut, as Charles River contends, by the "slight demerit" that the Commission assigned to BBI for insufficient substantiation of its program proposal. The Commission was well within its discretion in treating this as a venial sin and not a character defect that in effect vitiated the application. The effect of this "slight demerit" on BBI's program proposal was offset by a "slight demerit" assigned to Charles River.[43] And so the two applicants were

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[42] *See, e.g.*, Justice Rutledge in Screws v. United States, 325 U.S. 91 (1945); Judge Wright in Women Strike for Peace v. Hickel, —— U.S. App. D.C. ——, 420 F.2d 597 (1969).

[43] This was assigned on the ground that the ownership of Charles River by a charitable foundation implies limits on the amount of time which could be devoted to questions which may be related to legislation. Charles River says that its disability is unlike BBI's default since "it is a relatively minor disentitlement, in view of the vast number of topics

at a standoff under the criterion of proposed program service, as in essence resting on proposals no more than average in nature. That is, the Commission found no sub-

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appropriate for editorializing." This court's affirmance is not to be taken as affirming the Commission's reasoning in assigning a slight demerit to Charles River, in the absence of guidance from the Internal Revenue Service, or consideration of to what extent, *e.g.*, a fair and vigilant "guest page" editorial policy of contrasting viewpoints might be acceptable to both the Service and the Commission.

Since this is an area that turns in substantial measure on guidelines and regulations of the Internal Revenue Service, the Commission would have had standing to seek authoritative guidance, on the record, from the Service. The fact that the Commission is an "independent" agency in its decision-making does not mean that it may not properly be advised of pertinent policies under formation in the Executive Department.

Indeed we see no reason why the Commission and Treasury could not have organized a conference on areas of mutual concern, to see whether the legislative intention underlying the Revenue Act could not be achieved by guidelines or regulations that did not unwittingly or unnecessarily result in an impairment of public interest under the Communications Act, which could include reasonable balance in service of the public.

A Task Force of the first Hoover Commission recommended that the chairmen of the independent commissions be designated by the President from among the members, rather than determined by the members themselves, and assigned as an important consideration that this would facilitate legitimate channels of communication concerning interrelated policies without undercutting independence of action. Task Force Report on Regulatory Commissions [Appendix N], Prepared for The Commission on Organization of the Executive Branch of the Government, at 31-32 (1949).

This recommendation (though not endorsed by the Hoover Commission) was followed in reorganization proposals that subsequently were proposed by the President, and became effective in the absence of legislative disapproval. The Presi-

stantial differences, going beyond ordinary differences in judgment, which would establish a superior devotion to public service.

That in effect meant that the principal difference between Charles River and BBI was a difference in regard to the factor—referred to in the Policy Statement as a factor of "substantial importance"—of integration, of "participation in station management by owners." To some extent this difference in presentation may reflect a difference in the style of the applicant. Charles River in effect says that the claims of BBI were so extreme as to be untrustworthy. While the Hearing Examiner took note of the "exuberance" of BBI, he also pointed out that there was nothing wrong with an applicant's objective in fashioning its proposal so as to "impress the Commission" unless there was no sincere belief that the project could be accomplished. And he noted that both applicants suffered from the "endemic" taint of comparative applicants—exaggerated advancement of claims. The shortfall of Charles River on the integration showing he attributed to its being "excessively cautious." Charles River says it is merely being realistic, proposing a "meaningful" rather than spurious integration.

The Commission considered that the ultimate facts favored BBI on the integration factor. The Hearing Examiner's report concluded that Charles River was entitled to

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dent now designates the Chairman for a majority of the independent regulatory commissions.

Taking into account our "collaborative" or "partnership" kind of supervision of the agencies, we do not pursue the subject further at this time. It appears clear from the Commission's decision that any reconsideration or refinement of program proposals would be of minor consequence compared to the strong preference awarded BBI on the integration criterion.

little or no credit on the score of integration, 16 F.C.C. 2d at 258, para. 791, that perhaps out of "reticence" it had not made as "meaningful" a presentation as it had undoubtedly hoped even in staking out a modest credit for integration, 16 F.C.C. 2d at 252, para. 796. As to BBI, while he expressed doubts concerning its presentation, he expressly declined to discard its proposal, 16 F.C.C. 2d at 245, para. 759. There was no finding either of lack of bona fides or lack of practical possibility of fulfillment. It was the Commission's function to determine whether BBI's proposals merited belief in terms of practicability and likelihood of fulfillment. The Commission indicated its reasoning with reasonable clarity. It relied on the participation of the six BBI stockholders, and indicated what function each would perform. The findings are supported by substantial evidence in the record. "[I]t is the Commission, not the courts, which must be satisfied that the public interest will be served." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *WEBR, Inc.* v. *FCC*, 136 U.S.App.D.C. 316, 420 F.2d 158 (1969). We see no reason to disturb its judgment.

Affirmed.[44]

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[44] Greater Boston (II), successor in interest to Greater Boston (I) (one of the competing applicants at the time of the disclosure of Mr. Choate's activities) has no serious basis to challenge the conclusion that BBI would better serve the public interest. The Hearing Examiner endorsed the rebuttal in BBI's brief of the Greater Boston (II) application. One sentence sums it up: "Their interest in television may have been long but so far as this record reflects, it has never been deep." 16 F.C.C. 2d at 258.

We see no ground for holding that this appellant had a right to confine the Commission to consideration on the basis of the original record and to resist a fresh, comparative hearing.

APPENDIX B

JUDGMENTS BELOW

1. Judgment of Affirmance

The District of Columbia Circuit no longer enters formal judgments, but instead simply causes a docket entry to be made, and marks the line of its opinion that gives the date thereof, in this instance November 13, 1970, with a stamp reading "Judgment entered this date."

2. Order Denying Rehearing

(Filed Feb. 16, 1971)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

Nos. 17,785, 23,154, 23,172, 17,788, 23,159

GREATER BOSTON TELEVISION CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

WHDH, INC., a Massachusetts Corp., *Intervenor.*

WHDH, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee.*

GREATER BOSTON TELEVISION CORPORATION, a Massachusetts Corporation, *Intervenor*

CHARLES RIVER CIVIC TELEVISION, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

WHDH, INC., *Intervenor*

BOSTON BROADCASTERS INC., *Intervenor*

WHDH, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

BOSTON BROADCASTERS, INC., *Intervenor*

GREATER BOSTON TV CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION

WHDH, INC., *Intervenor*

BOSTON BROADCASTERS INC., *Intervenor*

Before: TAMM, LEVENTHAL and MACKINNON, Circuit Judges.

ORDER

On consideration of petitions for rehearing filed by WHDH, Inc. and by Greater Boston Television Corp., and after continuation of the careful study of the briefs and record that the oral argument showed was needful in view of the importance and complexity of the cases, the court is of the view that although modifications of relatively minor statements in the opinion are appropriate, no modification is warranted either of the result or the views set forth in the opinion on the issues before the court. Accordingly, it is

ORDERED by the Court that the opinion rendered November 13, 1970 is modified as follows:

(1) Page 6, line 9: Change "any other applicant, old or new" to "the other applicants then before it."

(2) Page 12, line 4: Change "report to the" to "obtain the approval of the."

(3) Page 12, footnote 3, line 10: Change "report to the" to "obtain the approval of the."

(4) Page 12, footnote 3, line 13: Change "attention." to "attention, for a determination whether Commission approval is required."

(5) Page 32, line 7: Change "to" to "to take it into account to such extent as would in effect." It is

FURTHER ORDERED by the Court that the petitions for rehearing, and the motion of WHDH, Inc., to hold its petition for rehearing in abeyance are denied.

Per Curiam

APPENDIX C

Opinion of April 16, 1964

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT.

Nos. 17785, 17788.

GREATER BOSTON TELEVISION CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

WHDH, INC., a Massachusetts Corporation, *Intervenor.*

WHDH, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*

GREATER BOSTON TELEVISION CORPORATION, a Massachusetts Corporation, *Intervenor.*

Argued Nov. 26, 1963.

Decided April 16, 1964.

Proceeding upon application for television station construction permit. The Federal Communications Commission issued a construction permit and a four-month operating permit. On appeal, the Court of Appeals held that proceeding in which construction permit and four-month operating permit were awarded corporation should be remanded to Federal Communications Commission to permit commission to consider whether and to what extent death of corporation's president would affect awards, where awards had been made upon a close margin in a closely contested comparative consideration, and president had been an important factor in the determination, and that commission could, upon reconsideration of awards, combine construction permit proceeding with proceeding

for renewal of station's license or conduct the proceedings simultaneously.

Remanded for proceedings consistent with opinion.

Before PRETTYMAN, Senior Circuit Judge, and BURGER and WRIGHT, Circuit Judges.

PER CURIAM:

In April, 1957, the Federal Communications Commission, after a long comparative hearing, awarded to WHDH, Inc., a construction permit for a television station on Channel 5 in Boston. Its findings were elaborate and detailed. They showed, *inter alia,* that one important factor for favoring WHDH on broadcast experience and for rating it favorably on civic participation and integration of ownership with management was the abilities and activities of its president, Mr. Choate. The award was appealed (Nos. 13896 and 13899). While the appeals were pending, suggestions were newly made that *ex parte* contacts with the Commission had been sought by some of the parties in the course of the Commission proceedings. After briefs and argument the court announced [1] that it found no error in the award but that the newly suggested *ex parte* contacts must be explored, and it remanded the case for that limited purpose, retaining jurisdiction.

After some complicated procedural steps,[2] including an

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[1] Massachusetts Bay Telecasters v. Federal Communications Comm'n, 104 U.S. App.D.C. 226, 261 F.2d (1958).

[2] See Massachusetts Bay Telecasters, Inc. v. Federal Communications Comm'n, 111 U.S.App.D.C. 144, 295 F.2d 131, *cert. denied,* WHDH, Inc. v. F. C. C., 366 U.S. 918, 81 S.Ct. 1094, 6 L.Ed.2d 241 (1961).

intensive hearing before the Honorable Horace Stern as Special Hearing Examiner, the Commission set aside the award to WHDH, reconsidered and reevaluated the applicants in light of the new factors, and again awarded the construction permit to WHDH. In the course of this reexamination the Commission, contrary to its Special Hearing Examiner, found that Choate had made improper, but ineffectual, approaches to the Commission Chairman and ascribed a demerit to WHDH on that account. At the same time, and in the same order, the Commission also awarded WHDH a four-month operating license for the station.[3] This was in September, 1962. The appeals now pending before us are from that decision. Thus there are now before the court for review (1) the 1957 award of the construction permit to WHDH and (2) the 1962 award of the four-month operating license to WHDH.

[1] The court is now advised that Mr. Choate died on December 21, 1963, after these appeals had been argued. We conclude that under such circumstances the proceedings should be remanded to afford the Commission opportunity to consider whether and to what extent these changed conditions affect the awards to WHDH.[4] This is indicated

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[3] WHDH had been on the air from the station since November, 1957, operating on an informal, or permissive, temporary authority issued after the Commission granted it a construction permit on the basis of the initial comparative hearing. In view of this fact and "the inroads made by WHDH upon the rules governing fair and orderly adjudication," the Commission was in 1962 reluctant to grant WHDH a full three-year term to its formal license; rather the Commission wanted to bring the operation of the station before it for early reappraisal. Therefore it set the term of the license at four months. The four months expired. WHDH applied for renewal. Other applicants applied. A comparative hearing upon the renewal application and its competitors has been set and is under way before the Commission.

[4] See, *e.g.*, Fleming v. Federal Communications Comm'n, 96 U.S.App.D.C. 223, 225 F.2d 523 (1955).

in a case where, as here, awards appear to have been made upon a close margin in a closely contested comparative consideration and because the Commission's findings reflect that the late Mr. Choate was an important factor favorable to WHDH and also was the cause of the demerit against that applicant. Obviously the resultant net assay is initially for the Commission. The case will therefore be remanded for such reconsideration.

The original awards of the construction permit and of the four-month license are before the court in the pending appeals, but when the remand presently ordered is effectuated those awards will again be before the Commission for reconsideration. The court does not prescribe the course or form of the proceeding on reconsideration, nor does it intimate any suggestion as to its result, *e. g.*, whether these initial awards be given one or the other of the present parties or whether no such awards be now given.

The proceeding for renewal of WHDH's license [5] is also before the Commission;[6] that subject is not now and has never been before this court. Clearly whatever changes may be wrought in the affairs and prospects of WHDH by the death of Mr. Choate may be pertinent both to the reconsideration of the initial awards and to the renewal proceedings. The public interest determinations, as they rest on the relevant preferences and demerits of WHDH, now must be considered in terms of the absence of Mr. Choate.

[2] Under such circumstances, if the Commission deems it to be in the public interest for the sake of efficiency,

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[5] Of course the renewal proceedings assume an initial license to WHDH. If on reconsideration upon this remand the Commission decides not to award the initial license to WHDH, the renewal proceedings lose their appropriateness.

[6] See note 3, *supra*.

economy and expedition to combine some or all of the features of these two proceedings into one proceeding, or to conduct the two simultaneously, the Commission is hereby authorized to consider such procedure as within the authority of this remand.[7] The court will retain jurisdiction of the cases.

Remanded for further proceedings consistent with this opinion.

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[7] Without in any way intimating a directive to the Commission as to the formal procedural steps it may take in the several proceedings which will be before it after this remand, we point out that it appears to us that difficulties may be encountered in any formal consolidation of the remanded proceedings and the renewal proceedings; *e.g.*, the parties are different. But it also appears to us that, since the evidence as to the merits and demerits of WHDH, absent Mr. Choate, on all the various features of the operation material to the award may be long and involved, and since that evidence might well be material to both proceedings (remanded and renewal), the Commission could appropriately adopt a procedure which would permit the taking of this evidence only once. The same might apply to any other evidence, and any argument, common to both proceedings.

APPENDIX D

PERTINENT FCC DECISIONS 1

1. FCC Decision Adopted January 22, 1969, Released January 23, 1969 (16 FCC 2d 1)

FCC 69–82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WHDH, INC., BOSTON, MASS.	Docket No. 8739 File No. BPCT–248
GREATER BOSTON TELEVISION CORP., BOSTON, MASS. For Construction Permits for New Television Stations (Channel 5)	Docket No. 11070 File No. BPCT–1657
In re Applications of WHDH, INC. (WHDH–TV), BOSTON, MASS. For Renewal of License	Docket No. 15204 File No. BRCT–530
CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS.	Docket No. 15205 File No. BPCT–3164
BOSTON BROADCASTERS, INC., BOSTON, MASS.	Docket No. 15206 File No. BPCT–3170
GREATER BOSTON TV CO., INC., BOSTON, MASS. For Construction Permits for New VHF Television Broadcast Stations	Docket No. 15207 File No. BPCT–3171

APPEARANCES

William J. Dempsey, *William C. Koplovitz*, *Harry J. Ockershausen*, and *J. Richard Carr* (Dempsey & Koplovitz) for WHDH, Inc.; *J. Joseph Maloney, Jr.* and *Joseph F. Tubridy* for Greater Boston Television Corp. and Greater Boston TV Co., Inc.; *Harry M. Plotkin*, *Thomas Schattenfield*, and *George H. Shapiro* (Arent, Fox, Kintner, Plotkin & Kahn) for Charles River Civic Television, Inc.; *Benito Gaguine*, *Jack P. Blume*, and *Donald E. Ward* (Fly, Shuebruk, Blume & Gaguine) for Boston Broadcasters, Inc.; and *John F. Reilly*, *William G. Secrest*, *Thomas B. Fitzpatrick*, and *Morton I. Berfield* for the Chief, Broadcast Bureau, Federal Communications Commission. (*Paul Dobin* (Cohn & Marks) represented witnesses Ruan and Rosenfield; and *Arthur I. Rosett* (Patterson, Belknap & Webb) represented witnesses Miller and Brumley.)

DECISION

(Adopted January 22, 1969)

COMMISSIONER BARTLEY FOR THE COMMISSION: CHAIRMAN HYDE ABSTAINING FROM VOTING AND ISSUING A STATEMENT; COMMISSIONER ROBERT E. LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER JOHNSON CONCURRING AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE ABSENT.

I. *Introduction*

1. The history of this proceeding may be found in the initial decision of Hearing Examiner Herbert Sharfman (FCC 66D–47, released

August 15, 1966), and will not, therefore, be set forth here. However, it will be helpful to an understanding of the manner in which this proceeding has reached its present posture if certain background facts are mentioned briefly. In September of 1962, the Commission released a decision [1] in which it affirmed its earlier decision of 1957 (22 FCC 767, 13 R.R. 507),[2] reinstated the grant of the application of WHDH, Inc. (WHDH) for authority to construct and operate a new television broadcast station on channel 5, Boston, Mass., and denied the competing applications of Greater Boston Television Corp. and Massachusetts Bay Telecasters, Inc. In addition, the Commission granted the applications (BLCT–761 and BLCT–762) of WHDH for licenses to cover construction permit, and issued such licenses for a period of 4 months only. Both WHDH and Greater Boston appealed from that decision. When WHDH filed its application for renewal of license, new and competing applications for the channel 5 facility were filed by Charles River Civic Television, Inc. (Charles River), Boston Broadcasters, Inc. (BBI), and Greater Boston TV Co., Inc. (Greater Boston II).[3] By memorandum opinion and order released October 29, 1963 (1 R.R. 2d 468), the Commission designated the new applications, together with the WHDH renewal application, for hearing on standard comparative issues.

2. After the appeals from the September 1962 decision had been argued but before the court had announced its decision, Mr. Choate of WHDH died. Consequently, the U.S. Court of Appeals for the District of Columbia Circuit, on April 16, 1964, remanded the proceeding to afford the Commission the opportunity to consider whether and to what extent the changed conditions arising from Choate's death affect the awards to WHDH.[4] The Court indicated that Choate's death might also be pertinent to the proceeding already designated for hearing on comparative issues, that the evidence as to the merits and demerits of WHDH, absent Choate, might be material to both proceedings, and that the Commission could appropriately adopt a procedure which would permit the taking of this evidence only once. Thereupon, the Commission by memorandum opinion and order (FCC 64–404) released May 8, 1964, reopened the record in dockets Nos. 8739 and 11070 (concerning the WHDH and Greater Boston I initial applications), and remanded the proceeding for hearing and initial decision on the following issues:

(1) To determine the changes made by WHDH, Inc. as a result of the death of Robert B. Choate; and

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[1] 33 FCC 449, 24 R.R. 255.

[2] Appeals were taken from the Commission's 1957 and 1962 decisions to the United States Court of Appeals for the District of Columbia Circuit. Those appeals are pending before the court, and the court has retained jurisdiction of the cases.

[3] As of the time of designation for hearing, 65 percent of the stockholders of Greater Boston II held 73.68 percent of the stock of Greater Boston Television Corp., or Greater Boston I. Although the Commission was aware that the composition of Greater Boston I and Greater Boston II was substantially the same, and normally Greater Boston II would be dismissed for this reason, the Commission determined that it would be inequitable to require dismissal of that application since the extended term of WHDH's operation under temporary authority deprived Greater Boston II of the opportunity to file a competing application against an ordinary renewal.

[4] *Greater Boston Television Corp.* v. *Federal Communications Commission*, 344 F. 2d 552, 2 R.R. 2d 2040. The court retained jurisdiction of the cases.

(2) To determine, in light of the evidence adduced pursuant to the above issue and the absence of Mr. Choate, whether the Commission's decision of September 25, 1962, in dockets Nos. 8739 and 11070 should be modified, and, if so, in what respects such decision should be modified.[5]

The Commission contemplated that the hearing examiner would determine the above issues first in his initial decision, and then treat the issues in dockets Nos. 15204–15207 in the same document. The Commission also consolidated the reopened proceedings in dockets Nos. 8739 and 11070 with the proceedings in dockets Nos. 15204–15207 for the limited purpose of taking evidence as to the effect of Choate's death on the WHDH applications in these proceedings. It was further provided that all applicants in dockets Nos. 15204–15207 would be permitted to address themselves to the question of the extent to which the operating record and experience of WHDH on channel 5 should be considered and the weight to be accorded, in the event that its application in docket No. 15204 is determined to be one for renewal of license or is treated as one for initial license.

3. The issues in this proceeding, either as included by the Commission or as added by the Review Board, are as follows:

To determine the changes made by WHDH, Inc. as a result of the death of Robert B. Choate.

To determine, in light of the evidence adduced pursuant to the above issue and the absence of Mr. Choate, whether the Commission's decision of September 25, 1962 in docket Nos. 8739 and 11070 should be modified, and if so, in what respects such decision should be modified.

To determine what efforts have been made by Greater Boston TV Co., Inc. to ascertain the programing needs and interests of the area its application proposes to serve and the manner in which it proposes to meet such needs and interests.

To determine whether Greater Boston TV Co., Inc. has reasonable assurance of being able to secure its proposed antenna site.

To determine, with respect to the stockholders, directors, and officers of WHDH, Inc.'s parent corporation, the Boston Herald-Traveler Corp., the information required by section II of FCC form 301, and, in light of the evidence adduced, to determine whether WHDH, Inc. is legally qualified.

To determine whether a grant of the application of WHDH, Inc. would be consistent with the provisions of section 73.636 of the Commission's rules.

To determine whether a grant of the application of WHDH, Inc. would be consistent with the provisions of section 310(a)(5) of the Communications Act of 1934, as amended.

To determine whether the control of WHDH, Inc. and the Boston Herald-Traveler Corp. has been transferred without Commission authorization in violation of section 310(b) of the Communications Act.

To determine, in view of the facts developed under the foregoing issue, [transfer] whether WHDH, Inc. possesses the requisite character qualifications to be a Commission licensee.

To determine on a comparative basis which of the operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in light of the significant differences among the applicants as to:

(*a*) The background and experience of each, bearing on its ability to own and operate the proposed television broadcast station.

(*b*) The proposals of each with respect to the management and operation of the proposed television broadcast stations.

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[5] The following possibilities were contemplated by the Commission: whether the grant to WHDH should be reaffirmed, whether a grant should be made to Greater Boston Television Corp. (Greater Boston I), or whether there should be no grant in dockets Nos. 8739 and 11070 in the circumstances.

(c) The programing services proposed in each of the above-captioned applications.

To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

4. Hearing Examiner Herbert Sharfman concluded, with respect to the issues added because of Choate's death, that no material changes have been made by WHDH as a result of Choate's death, and that reevaluation of the original record made by WHDH and Greater Boston would advance neither the interests of either applicant nor the overriding public interest in the ending of this lengthy proceeding. Accordingly, he concluded that modification of the Commission's decision of September 25, 1962, would not serve the public interest. Examiner Sharfman held further that the questions of comparative demerit, if any, to be assessed against WHDH because of Choate's ex parte contacts, and the effect of Choate's death, can be argued effectively and with greater overall expedition in the renewal proceeding. After having resolved favorably the noncomparative issues relating to WHDH, and unfavorably such issues relating to Greater Boston II, the examiner ultimately preferred WHDH's application on a comparative basis. Accordingly, he recommended that the application of WHDH, Inc. for renewal of license be granted, and that the competing applications be denied.

5. Oral argument on the exceptions to the initial decision was held before the Commission, en banc, on September 5 and 6, 1967. Each party was afforded the opportunity to address itself to the question of the applicability in this proceeding of the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901 (1965). The Commission's rulings on the exceptions to the initial decision are set forth in the appendix to this decision. We have reviewed the examiner's findings of fact in light of the exceptions, and we are of the view that they are substantially accurate and complete. Accordingly, they are adopted with the modifications noted herein and in the appendix. However, we view those findings as warranting substantially different conclusions and a different ultimate result. For the reasons set forth below, our judgment is that grant of the application of Boston Broadcasters, Inc. would best serve the public interest, convenience and necessity.

II. *Petition for Leave To Amend and Request for Amendment Pursuant to Section 1.65 of the Commission's Rules* [6]

6. *Petition for leave to amend.* On September 29, 1967, Charles River Civic Television, Inc. (Charles River) requested permission to amend its application to reflect the death, on September 6, 1967, of Mr. Ernest Henderson, a director of Charles River and the holder of 2,000 shares of Charles River's class A, nonvoting common stock. Mr. Henderson

[6] Two petitions of BBI may be disposed of at this point: (a) on Feb. 6, 1967, BBI requested a 1-day extension of time within which to file its reply to exceptions. The request is unopposed, and it will be granted, and (b) on Nov. 6, 1966, BBI requested waiver of sec. 1.227(c) of the rules to permit the filing of briefs exceeding 50 pages in length. The request will be dismissed as moot inasmuch as no one of the parties filed briefs approaching this limitation.

was also a trustee of the Charles River Civic Foundation. Charles River asserts that the requested amendment will not require a reopening of the record herein and will not result in a comparative advantage to Charles River. On October 10, 1967, the chief, Broadcast Bureau, filed comments supporting the petition. The unopposed petition will be granted and the amendment will be accepted for filing.

7. *Request for amendment pursuant to section 1.65 of the Commission's rules.* On August 18, 1967, BBI filed a petition requesting that the Commission require WHDH to amend its application, pursuant to section 1.65 of the rules, to bring it up to date with respect to alleged personnel, programing, and ownership changes which, BBI alleges, are of decisional significance. As to personnel, BBI asserts that substantial changes have occurred in the staff personnel assigned to the television operation exclusively and in the executive personnel of the television station. Based upon schedules for a 2-week period in the TV magazine section of the Boston Sunday Herald, BBI states that programing changes of such magnitude as to require an amendment have occurred in the operation of WHDH–TV. Moreover, BBI contends that one Joseph Linsey has been characterized by Mr. Akerson as a "major stockholder" in Herald-Traveler,[1] and that WHDH should file an amendment to reflect this ownership change.

8. WHDH and the Broadcast Bureau oppose BBI's request. In substance, WHDH denies the allegations made by BBI, stating that the majority of the television station's employees are still employed by the station, and some changes have occurred as a result of normal turnover in station operation. In particular, WHDH asserts that it is not true that Mr. McGrath, the executive vice-president and a director of WHDH, Inc., and who is also the general manager of the television station, no longer is connected with the station. With regard to programing, WHDH asserts that no changes of any substantial character have occurred in its programing. Concerning ownership changes, WHDH states that Mr. Linsey does not own directly or indirectly a reportable interest in Herald-Traveler stock, and that "there is no rule, regulation or policy of the Commission which would make his ownership of less than 1 percent of the stock of decisional significance in the instant proceeding."

9. We agree with WHDH and the Broadcast Bureau that the showing submitted by BBI does not warrant our entering an order that the WHDH application be updated pursuant to section 1.65 of the rules. We believe that if there were real substance to BBI's allegations, BBI would have asked that the record herein be reopened and that the proceeding be remanded for further hearing under an issue to determine whether WHDH, Inc., had failed to comply with the provisions of section 1.65 of the Commission's rules. To support that request, BBI necessarily would have been required to submit a far more substantial showing. See section 1.229 of the rules. Additionally, in light of the action which we take herein with respect to the WHDH appli-

[1] BBI refers to an article in the Wall Street Journal of July 25, 1967, wherein Akerson is alleged to have made this statement.

cation, no useful purpose would be served by granting the relief requested, even if it were otherwise appropriate to do so. BBI's request will, therefore, be denied.

Special Issues Relating to WHDH

10. No extended discussion is necessary with respect to the noncomparative issues which were addressed to WHDH. Those issues inquired into: the legal qualifications of WHDH; whether a grant of the WHDH application would be consistent with the provisions of section 73.636 of the Commission's rules (concerning multiple ownership); whether a grant of the WHDH application would be consistent with the provisions of section 310(a)(5) of the Communications Act (citizenship requirements); and whether control of WHDH, Inc. and the Boston Herald-Traveler Corp. has been transferred without Commission authorization in violation of section 310(b) of the Communications Act. Except for the aspect of the latter issue which relates to de facto control, we agree with the conclusions which the examiner reached on these issues. The question of de facto control will be treated subsequently in connection with the standard comparative issue.

11. The recent issuance of a report and order in docket No. 15627 [8] provides added support for the examiner's conclusion that WHDH is not disqualified under section 73.636 of the rules relating to multiple ownership. This question arose principally because Lill & Co., which acquired a reportable interest in Herald-Traveler stock, is the record holder for Television-Electronics Fund, Inc., of a reportable interest in five other Commission licensees, four of whom are multiple owners of VHF–TV stations with a combined total of 20 TV stations.[9] In addition to those reasons asserted by the examiner, we conclude that the report and order in docket No. 15627 is also dispositive of the multiple ownership issue inasmuch as the Commission's multiple ownership rules have been amended to increase from 1 percent to 3 percent the percentage of stock which investment entities may own in specified broadcast licensees.

Special Issues Relating to Greater Boston II

12. Two disqualifying, noncomparative issues were directed to Greater Boston II which the examiner determined adversely to that applicant. Those issues related to: (*a*) the efforts made by Greater Boston II to ascertain the programing needs and interests of the area its application proposes to serve and the manner in which it proposes to meet such needs and interests; and (*b*) the question whether Greater Boston II has reasonable assurance of being able to secure its pro-

[8] *In the Matter of Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 13 FCC 2d 357, released June 17, 1968.

[9] As of July 20, 1965, Lill & Company held 7600 shares of Herald-Traveler stock, of which Television-Electronics Fund, Inc., is the beneficial owner. As nominee for that Fund, Lill & Company also holds the following stock: 115,000 shares (2.48 percent) of American Broadcasting Cos., Inc.; 35,000 shares (2.57 percent) of Capitol Cities Broadcasting Corp.; 2.42 percent of Storer Broadcasting Co.; 30,000 shares (1.158 percent) of Scripps-Howard Broadcasting Co.; and 95,000 shares (1.02 percent) of Zenith Radio Corp.

posed antenna site. We agree with the examiner's adverse resolution of these issues (initial decision paragraphs 712-717). Accordingly, Greater Boston II is disqualified and is not entitled to comparative consideration with the other applicants. We also agree with the examiner's conclusion at paragraph 793 of his initial decision that even if comparative consideration were given to Greater Boston II's application, the showings thereunder are unimpressive.

III. *The Status of WHDH Under the Standard Comparative Issue*

13. Two questions are presented in connection with WHDH's status under the standard comparative issue: (*a*) are Mr. Choate's ex parte contacts, in light of his death, still to be treated as a factor in the comparative evaluation; and (*b*) is the Commission's policy statement on comparative broadcast hearings fully applicable to this proceeding?

14. The Examiner concluded that because of Mr. Choate's death his ex parte contacts are no longer a factor in the comparative evaluation. In reaching this conclusion, the examiner discussed the contentions of Charles River and BBI to the effect that Choate's death did not terminate the consequences of his ex parte contacts because WHDH "ratified" his actions by reelecting him to office while WHDH was under a cloud, and because individual directors of WHDH in testimony herein did not voice disapproval of his conduct. The examiner also considered and rejected Charles River's contention that because Choate's conduct, the effect of which is impossible to assess, was calculated to influence the Commission during the course of the first comparative proceeding which resulted in a grant to WHDH, his conduct must be held to pervade the grant itself and cannot be purged by either the subsequent conduct of WHDH or by Choate's death. The exceptions of Charles River, BBI, and Greater Boston, in essence, reiterate viewpoints which were before the examiner. In view of our denial of the WHDH application on other grounds, it is unnecessary to determine whether the examiner reached a proper result on this question.

15. In responding at oral argument to the question of the applicability herein of the Commission's policy statement on comparative broadcast hearings, supra, each of the parties, with the exception of Greater Boston and WHDH, stated that the policy statement is applicable. Greater Boston stated no position, deferring instead to "counsel who are much more experienced in this area." WHDH, however, points out that the policy statement was adopted in 1965 after the record herein was closed. WHDH asserts that if the statement is to apply to this proceeding, the record would have to be reopened and the case retried on that basis. When we adopted the policy statement on July 28, 1965, we stated that it did not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license. However, in *Seven (7) League Productions, Inc.*, 1 FCC 2d 1597, released December 13, 1965, we stated that the policy statement should govern the introduction of evidence in proceedings where a renewal application is contested. At the same time, we made it clear that the parties would be free to urge any arguments they

might deem applicable concerning the relative weight to be accorded the evidence bearing on the various comparative factors. This proceeding was terminated before an initial decision was released. We took a similar position in a pending renewal-new applicant proceeding (*RKO General, Inc.* (*KHJ-TV*), FCC 66-503, released June 8, 1966),[10] and we stated that "[w]e have not, however, reached any determinations as to weight to be accorded various factors of difference between the renewal applicant and the competing applicant, preferring instead to do so later upon the full, factual hearing record that is developed by competent evidence under the designated issues." Again, we stated that parties in a contested renewal proceeding are free to urge any arguments they may deem applicable concerning the relative weight to be accorded the evidence bearing on the various comparative factors developed at a hearing.

16. Contrary to the position of WHDH, we do not believe that applying the policy statement to this proceeding would require reopening the record so that the case may be retried on that basis. No element of surprise affecting the fairness of the hearing exists inasmuch as we did not adopt new criteria in the policy statement which would call for the introduction of new evidence; rather, we restricted the scope somewhat of existing factors and explained their importance more clearly. Thus, we shall apply the principles of the policy statement to this proceeding, and as we proceed with the comparative discussion we shall determine the weight to be accorded the various factors of difference between the renewal applicant, WHDH, and the competing applicants.

IV. *Evaluation of Comparative Criteria*

17. Our basic disagreement with the examiner's conclusions lies in the preferred status which he gave to WHDH "not because it is an applicant for renewal but because it has an operating record and its very existence as a functioning, manned station to advance against its opponents, whose promises, after all, are as yet just so much talk." Thus, the examiner decided that the traditional mode of comparing mutually exclusive applicants, "in the mechanical or point-by-point manner especially advocated by BBI", would have been a sterile exercise. In his judgment, the cardinal probative attribute—for good or bad—of WHDH was its operating record. The examiner's thinking is highlighted by the following quotation from his conclusions:

> In the present case WHDH should have cashed in its chips and gone home before the game started if it were forced to depend on its conformity to the traditional standards for preference. Its integration is small. Only if its long identification with the community through newspaper and station operation were regarded as a near-substitute for local ownership because it has enabled the applicant to acquire a knowledge of the community, could it claw a foothold. Facing the cleverly designed organizations and preparatory campaigns of locally-

[10] In addition, we stated that, as in regular comparative hearings, evidence relating to programing proposals and to character will not be entertained in the contested renewal proceeding unless first specifically put in issue by the hearing order or on subsequent enlargement of the issues upon a threshold factual showing that a distinctive difference or deficiency exists and is worth exploring.

owned, civically active opponents, each integrated to a different degree but more than it is, and proposing managerial direction by fairly experienced persons, WHDH's prognosis would be poor unless it could rely for a clincher on its operating record unabated by any substantial "character" or other defects.

With regard to WHDH's past broadcast record, Examiner Sharfman concluded ultimately that as a whole such record is favorable. The superiority of WHDH's claims to renewal against those of its competitors for initial authorization, the examiner stated, rests on a basis of achievement, theirs on promises, often glittering, but of relatively uncertain and unestablished validity.

18. In our judgment, the examiner's approach to this proceeding places an extraordinary and improper burden upon new applicants who wish to demonstrate that their proposals, when considered on a comparative basis, would better serve the public interest. In fairness to the examiner, it should be pointed out that he followed what he understood to be the Commission's policy in proceedings of this nature, as expressed in *Hearst Radio, Inc.* (*WBAL*), 6 R.R. 994 (1951), and *Wabash Valley Broadcasting Corporation* (*WTHI-TV*), 35 FCC 677, 1 R.R. 2d 573 (1963). Thus, in "Hearst" the determining factor in the Commission's decision was "the clear advantage of continuing the established and excellent service * * * [of the existing station] when compared to the risks attendant on the execution of the proposed programing of * * * [the new applicant] excellent though the proposal may be." The Commission also gave serious consideration to the high degree of probability of continuation of existing desirable performance as against paper proposals which, on the basis of that record, the Commission was not convinced could be fulfilled. "Wabash" stands for essentially the same propositions.

19. With the experience gained from deciding comparative proceedings in the years subsequent to both the "Hearst" and "Wabash" cases, we determined in 1965 that the issuance of a policy statement on comparative broadcast hearings would serve a significant purpose as a distillation of our accumulated experience. As noted earlier herein, the policy statement is applicable to this proceeding. This being so, a different approach from that formerly employed is required when we consider a past broadcast record, whether that record relates to a new applicant with some past broadcast experience, or to a renewal applicant. That factor is of substantial importance in ascertaining which of several applicants offers the best practicable service to the public, which is one of the two primary objectives toward which the comparative process is directed. As the policy statement indicates, a past record within the bounds of average performance will be disregarded, since average future performance is expected; and emphasis will be given to records which, because they are either quite good or very poor, give some indication of unusual performance in the future. Thus, while a renewal applicant must literally run on his record and such record is the best indication of its future performance,[11] that record is meaningful in the comparative context only if it exceeds the bounds of average performance. We believe that this approach is sound,

[11] *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 123 U.S. App. D.C. 328, 359 F. 2d 994, 7 R.R. 2d 2001 (1966).

for otherwise new applicants competing with a renewal applicant would be placed at a disadvantage if the renewal applicant entered the contest with a built-in lead arising from the fact that it has a record as an operating station. More importantly, the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset.

A. *Past Broadcast Record*

20. As the policy statement states, past records are considered to determine whether the record shows: (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission. In the latter connection, the Commission stated that the fact that such representaions have been carried out does not lead to an affirmative preference for the applicant, since the Commission expects, as a matter of course, that a licensee will carry out representations made to the Commission.

21. Considering the record of WHDH-TV in this light, it is clear from the examiner's findings of fact that the only valid conclusion which can be reached is that the record is one within the bounds of average performance. In short, WHDH-TV's record does not demonstrate unusual attention to the public's needs or interests. This determination is also consistent with the examiner's conclusion that as a whole the record of WHDH-TV is favorable. Yet, we also agree with the examiner that the quality of this overall performance is lessened to some degree by WHDH's failure, on occasion, to provide for the discussion of certain controversial problems of local interest, and by its failure to editorialize.

22. Charles River and BBI assert in their exceptions that WHDH is to be charged with a failure to match performance with promise because many of the programs proposed by it when it first submitted a non-network proposal were not carried when it revised its entire program schedule so as to accommodate its affiliation with a network, shortly after the grant of its application for construction permit in 1957. As the examiner's findings indicate, few programs were retained from the original program proposal, and changes were made in these to reflect the network operation. However, we agree with the examiner's disposition of this matter. As he stated, when WHDH received its original award it did not receive a preference for either its program policies or its proposed program service. At the time of the original grant in 1957, the Commission knew of WHDH's possible network operation, and when WHDH filed its application for license in late 1957, it advised the Commission that it was going to be a network affiliate and carry network programs. It filed no new program schedule with the license application, nor was it requested to do so. Thus, as the examiner held, the mere fact of departure from the particulars of its non-network schedule proposals, required as it was by the practicalities of network operation, cannot be held against WHDH. Indeed, this

record does not present a clear opportunity to compare WHDH's promises with its performance inasmuch as the record does not contain a program proposal, based upon network affiliation, which can be compared with the renewal showings.

23. In view of the foregoing, the past broadcast record of WHDH will not enter into the comparative evaluation.

24. The past broadcast record compiled by Mr. Jones of Charles River is available for consideration inasmuch as he has an ownership interest in Charles River and is the majority stockholder (as well as the president, treasurer, general manager and a director) of Charles River Broadcasting Co. which is the licensee of stations WCRB–AM and FM in Waltham, Mass. Although that licensee wholly owns the stock of another corporation which is the licensee of an FM station (WCRQ–FM) in Providence, R.I., no findings were made with regard to the record of the latter station, and no exceptions were taken to this omission.

25. Based upon his extensive findings in this connection, the examiner concluded that "WCRB is preeminently a 'good music' station—and its record in its specialty is excellent—with considerable news and some other non-musical programs. It is and thinks of itself as a regional station, but pays some attention to Waltham, its location." While WCRB's record in its specialty may be excellent, this characterization is not the same as saying that on an overall evaluation of its record such record is unusually good because it shows particular attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs. This latter consideration is the one which, under the policy statement, takes a past record out of the bounds of average performance. Viewed in this light, we think that it is as reasonable to conclude from the examiner's findings that WCRB's past record is only within the bounds of average performance. While WCRB as a regional station has an obligation to meet the needs generally of its entire service area, it should at the same time endeavor to meet the needs of the community of its location. This obligation may increase when, as here, the stations are the only ones assigned to the community. The examiner's findings regarding the past record of WCRB warrant the conclusion that WCRB's past record does not demonstrate unusual attention to the public's needs and interests, particularly those of the city of Waltham. Thus, although a listener survey was conducted, in keeping with WCRB's view that its service area is larger than just Waltham, that survey was not classified to segregate the responses of Waltham residents. Nor was any particular class of Waltham residents contacted in a formal survey which was conducted, except for some Waltham ministers regarding religious programs. In addition, the findings show that little time is devoted to discussion and talks programing, and that no time is devoted to agricultural programing. Moreover, in its publicity WCRB identifies itself with Boston and only incidentally with Waltham. The foregoing findings buttress our conclusion that WCRB's past record is within the range of average performance only.

26. In view of the foregoing, the past broadcast record of Mr. Jones will not enter into the comparitive evaluation.

B. *Diversification of the Media of Mass Communications*

27. As noted in the policy statement, diversification is a factor of first significance since it constitutes a primary objective in the Commission's licensing scheme. The benefits derived from diversification have been set forth in many cases decided by the courts and by the Commission, and they need not be recited in detail here.[12] When compared with Charles River and BBI, WHDH manifestly ranks a poor third because of its ownership of a powerful standard broadcast station, an FM station, and a newspaper in the city of Boston itself. While it is true that the existence of numerous other media in Boston in which WHDH has no ownership interest may not be ignored and does somewhat diminish the weight to be accorded the preferences to Charles River and BBI on local diversification, nonetheless those preferences are quite significant here. A grant to either Charles River or BBI would clearly result in a maximum diffusion of control of the media of mass communications as compared with a grant of the renewal application of WHDH. A new voice would be brought to the Boston community as compared with continuing the service of WHDH–TV. We believe that the widest possible dissemination of information from diverse and antagonistic sources is in the public interest, and this principle will be significantly advanced by a grant of either the Charles River or the BBI application.

28. The desirability of maximizing the diffusion of control of the media of mass communications in Boston is highlighted by the Herald-Traveler's premature publication in its newspaper of a preliminary draft of a report of the Massachusetts Crime Commission without also simultaneously publicizing the report over its broadcast stations. Although the Herald-Traveler received the preliminary draft 4 or 5 days before it was published, personnel of Herald-Traveler's broadcast stations first heard of the impending publication of the draft report in the newspaper about midnight of the night before the draft was published. At the 1954 hearing, the testimony was that news would not be withheld from the public just because the Herald-Traveler publishes a newspaper. At the hearing in 1965, Mr. Akerson agreed that had any part of the story about the draft report appeared on the Herald-Traveler's stations, prior to newspaper publication, such news broadcast would have adversely affected the "scoop" value of the story. In this instance, the joint ownership of newspaper and broadcast interests inured to the disadvantage of the broadcast stations and their listeners.

29. Although conceding that it has never editorialized, WHDH contends that this is a factor which minimizes any question of concentration of control flowing from the common ownership of newspaper and broadcast interests. We disagree with this contention. Licensees have an obligation to devote a reasonable amount of their broadcast time to the presentation of programs on controversial issues of public im-

[12] Recognizing that radio and television broadcast stations play an important role in providing news and opinion, it is important in a free society to prevent a concentration of control of the sources of news and opinion. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 13, 189 F. 2d 677, *cert. den.* 342 U.S. 830. See also, *Associated Press* v. *United States*, 326 U.S. 1, 20.

portance to their communities. *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949). If anything, the failure to editorialize demonstrates the wisdom of the Commission's policy in favor of a maximum diffusion of control of the media of mass communications.

30. The foregoing incidents reduce the favorable consideration which might otherwise accrue to WHDH because of the number of competing media in Boston. In addition, not to be overlooked on the question of diversification is the controlling interest which WHDH has in Entron, Inc., a manufacturer of CATV components, and which has interests in several CATV systems which are at some distance from Boston. In sum, the preference which both Charles River and BBI merit over WHDH on the factor of diversification of the media of mass communications is substantial.

31. As between Charles River and BBI, BBI merits a slight preference on the diversification factor, for, as the examiner concluded, BBI is virtually free of any media alliance and Charles River's media connection is "trivial by comparison locally and only tenuously suggested nationally." (See *Initial Decision*, paragraph 796.)

C. *Integration of Ownership With Management*

32. In securing the best practicable service, full-time participation in station operation by owners is a factor of substantial importance because it is inherently desirable that legal responsibility and day-to-day performance be closely associated. Moreover, there is a likelihood of greater sensitivity to an area's changing needs, and of programing designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. In this area of comparison, we agree with the examiner's conclusion that both Charles River and BBI are integrated to a substantially greater degree than is WHDH, whose integration is small.

33. As between Charles River and BBI, BBI merits a significant preference. In assessing the important differences between applicants on the integration factor, those attributes of participating owners, such as their experience and local residence, are considered in the weighing process. This is so since the value of integration of ownership with management is increased if the participating owners are local residents and if they have experience in the field. Apart from the actual degree of integration of ownership with management, it is difficult to draw any meaningful distinctions between Charles River and BBI inasmuch as they both demonstrate essentially equal local residence. It is also true that no significant differences exist between these two applicants in the matter of experience for, as the examiner noted, both have associated with them persons having broadcast or television operating and production experience.

34. The critically important consideration here is the degree to which those individuals having ownership interests in Charles River and BBI would play a distinguishable part in the management of the day-to-day operation of the proposed station. In this connection, we are primarily interested in full-time participation in station operation by the owners, and to the extent that the time spent is less than full time, the credit given will drop sharply. Little credit is to be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis.

35. Although all of Charles River's stock will be held ultimately by the Charles River Civic Foundation, we agree with the examiner's conclusion that Charles River's claimed integration may be considered here. Respecting full-time participation, only Mr. Jones, who now holds 4.9 percent of Charles River's nonvoting stock and is that applicant's president in addition to being a director, will so participate.[13] Mr. Jones would be the general manager of the proposed television station. Although he has broadcast experience, that experience is of diminished importance here since it was acquired in the operation of an AM and FM station, which stations employed a specialized format. The full-time participation of BBI's stockholders would be as follows: Mr. David, executive vice-president and a 6.31 percent stockholder, as administrative officer and general counsel; Mr. Burdick, a 5.91 percent stockholder after grant of the application, as general manager; Mr. Pickard, a 2.36 percent stockholder after grant, as director of news and public affairs; Mrs. West, a 1.53 percent stockholder, as executive assistant to the general manager; Mr. Steele, a 0.86 percent stockholder, as associate director of public affairs; and Mr. Hoffman, a 3.06 percent stockholder, in charge of product and credit clearance. Thus, quantitatively, BBI is in a superior position to Charles River on the integration factor. Qualitatively, BBI is also in a better position than Charles River inasmuch as certain of the full-time participating owners of BBI would bring extensive television operating experience to the proposed station. Thus, Mr. Burdick has had wide experience in the administration and operation of noncommercial television stations in Philadelphia, Pa., as well as with the educational television station of the University of North Carolina. While this experience was not acquired in commercial television operation, it is nonetheless meaningful experience. In addition, Mr. Burdick has had several years of experience as program director of a California standard broadcast station. As was the case with Mr. Jones, this experience, however, is of less importance here. Mr. Pickard has extensive experience in the field of television station news operations and public affairs programing. Also of significance is the regulatory experience which was acquired by Mr. David with the Federal Communications Commission. Although such experience is not to be equated with operating experience, it does provide assurance of knowledge of the framework of the Communications Act and the Commission's rules and its policies. *Grand Broadcasting Co.*, 36 FCC 925 (1964).

36. While both Charles River and BBI have proposed other stockholders for participation in station operation, little credit can be given to that participation here since those individuals will not devote substantial amounts of time to the station on a daily basis. Although both Charles River and BBI have stockholders who are long-time local residents, the credit to be given in each case is slight since full-time participation in station affairs is not demonstrated.

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[13] We agree with the examiner's conclusion that Mr. Saudek cannot count as a principal for integration purposes, since he has no ownership interest even in the Charles River applicant.

D. *Proposed Program Service*

37. The hearing herein was conducted under procedures which permitted extensive showings with respect to proposed program service as well as the means which were employed in formulating the proposals to meet the area's needs and interests. As the examiner's initial decision demonstrates, Charles River and BBI engaged in wide-ranging efforts to support the programming service which each proposes.[14] While we disagree with the examiner's adverse characterization of the efforts which Charles River and BBI made in this area of comparison, we are constrained to observe that the extensive showings made by these two applicants offer increased support for the views which we enunciated in our policy statement on comparative broadcast hearings. Thus, the policy statement asserts that because of our experience with the similarity of program plans, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. While, as the examiner stated, BBI employed more elaborate methods of ascertaining the area's needs than did Charles River, in neither case do the methods employed seem to have had an appreciable effect upon the program proposals. We believe in the final analysis that both applicants made no more than acceptable efforts to ascertain local needs and interests through local contacts and surveys. No preference, therefore, is due either of the applicants with respect to preparation and planning.

38. With regard to the respective program proposals themselves, decisional significance is accorded only to material and substantial differences between the applicants' proposed program plans. Substantial differences are considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. Although an unusual attention to local community matters for which there is a demonstrated need may be urged, there is no assumption that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Minor differences in the proportions of time allocated to different types of programs are not considered. This is so because precisely formulated program plans may have to be changed not only in details but in substance to take account of new conditions at the time a successful applicant commences operation. Against this background, it is clear, as the examiner's findings show, that Charles River and BBI propose generally well-balanced program schedules, and that neither applicant's proposal demonstrates any substantial differences extending beyond ordinary differences in judgment which show a superior devotion to public service. This conclusion is not inconsistent with the examiner's characterization of both program proposals as supplying the community, in their local offerings, a diversity of excellent programs inasmuch as that characterization is not synonymous with programing which shows a superior devotion to public service.

[14] As the examiner stated, "Even WHDH, an operating station, paid deference to the importance of a formalized ascertainment of public tastes by offering evidence about its program committee * * *."

39. One aspect of BBI's program proposal in particular merits discussion. BBI proposes to devote 36.3 percent [15] of its 160.5 hours of weekly programing to local live programs. In contrast, WHDH's 1962 renewal application composite week showing for local live programing is 22 percent, and Charles River's proposal would devote 28.5 percent of its weekly programing to local live programs. Holding that the crucial consideration is whether BBI established its ability to produce its "extraordinary percentage" of local live programs, the examiner stated that BBI can only invoke brave generalities in support of its claimed ability. In addition, he stated that BBI's proposal so far exceeds that shown in WHDH's renewal application, is so much in excess of any network station and is in the vicinity of the highest percentage for independent stations, that suspicion arises that BBI's percentage figure "was flashed for its supposed value in a comparison." In sum, the examiner held that BBI's local live program proposal was insufficiently supported. Although BBI's exceptions challenge the examiner's conclusion as contrary to his findings of fact, we are not persuaded that this is so. When an applicant proposes such a substantial amount of local live programing as has BBI, that applicant runs the risk of having a demerit attach to its showing if it offers no substantiation for that aspect of its program proposal. It is no answer to state that the proposal is feasible because Boston is the fifth largest market in the United States and has well-known cultural, educational, civic and religious institutions which ensure virtually an inexhaustible supply of participants and subject matter for local programing. Nor is it any answer to state that the feasibility of the proposal is demonstrated by substantial surveys indicating both the need therefor and the willing cooperation of civic, educational, religious, and charitable groups because, as noted, those surveys had no appreciable effect upon the program proposals. In light of the foregoing discussion, we hold that BBI should receive a slight demerit because of its insufficiently supported local live programing proposal.

40. We do not believe that BBI is entitled to a preference for its proposed 24-hour operation for 5 days a week, Tuesday through Saturday, because adequate hours of operation are proposed by Charles River and WHDH.

41. There is one feature of Charles River's programing proposal which warrants the assessment of a slight demerit against that applicant. Charles River Civic Foundation will ultimately own all of the stock of the Charles River applicant. To retain the foundation's tax exemption as a charitable organization, no substantial part of its activities may, pursuant to the Internal Revenue Code, include carrying on propaganda or otherwise attempting to influence legislation. In addition, the code permits tax exemption only if the organization "does not participate in or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office." The indenture of trust creating the foundation contains language of similar import. Thus, although the

[15] While BBI proposed that 45.3 percent, or over 72 hours, of its weekly programing would be local live, 9 percent of that total would consist of taped repeats.

applicant Charles River itself would pay taxes, it appears that, as found by the examiner (id., par. 236), because of the ownership of all of its stock by the foundation, the Internal Revenue Service may take the position that the applicant would be bound by the provisions of the code relating to exempt organizations. Although Charles River proposes to editorialize, it is manifest that there are limitations on the amount of time that could be devoted to controversial questions which may be legislatively related, and that such limitations are not found in ordinary television station operations. To this extent, then, the proposed operation of Charles River suffers in comparison with that of BBI. The result is that a slight demerit is assessed against Charles River on this score.

42. In weighing the slight demerits which have been assessed against BBI and Charles River, we conclude that they are offsetting in nature, and that neither applicant is entitled to a preference over the other in the matter of proposed program service. In the overall weighing process, we conclude that no one of the applicants merits a preference over the others regarding proposed program service. Thus, WHDH's program service would be a continuation of service which has been determined to be one within the bounds of average performance only, and in essence the proposals of Charles River and BBI are no more than average in nature inasmuch as there are present in neither proposal substantial differences, going beyond ordinary differences in judgment, which show a superior devotion to public service.

E. *Other Factors*

43. A question to be resolved is whether an unauthorized transfer of de facto control occurred upon the election of a new president (Akerson) of Herald-Traveler. Based upon his extensive findings of fact, the examiner concluded that "[b]ecause of the peculiar but not unique situation of the Herald-Traveler in which *management* (the president) is in actual control, the election of a new president in fact created a new locus of control." In this regard, the examiner stated that the presidential dominance exercised by Winslow was continued by Choate and Akerson. The examiner held that it is unfair to hold WHDH accountable for failing to realize that the "transfusion of ichor" from Winslow to Choate and from Choate to Akerson demanded prior Commission approval inasmuch as there is no Commission precedent requiring that prior approval should be obtained before a given individual is appointed or elected to be an officer of a licensee corporation. We disagree with the examiner's conclusions in this respect, and, for the reasons which are given hereafter, we hold that an unauthorized transfer of de facto control has occurred.

44. The following facts are illustrative of the actual control centered in Akerson (also Choate and Winslow, earlier). The Herald-Traveler Board of Directors is not a center of de facto or actual control; that board has never given any instructions as to the voting of WHDH stock or the election of directors; the board does not discuss station policies, practices, or programing; except for submitting capital outlays over $100,000 to the Herald-Traveler Board for its consideration, Choate was, and Akerson is, empowered to take any action thought necessary

for the operation of the television station; when Choate was ill, Akerson performed his duties without further direction from the board; and when the board passed its resolution after Choate's death that there had not been, and would not be, any change in station policies, at least five members of the board did not know what policies they were leaving unchanged. Against this background, and in light of the Commission's desire to be put on notice regarding the acquisition of any de facto control, it is clear that a transfer of control application should have been filed by WHDH.

45. Although it may be generally true that in the ordinary situation a routine change in officers should be reported to the Commission within 30 days after the event, the fact of the change of the locus of actual control demonstrated here places the matter in an entirely different posture. Section 310(b) of the Communications Act of 1934, as amended, provides in substance that no station license shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Section 1.541 of the Commission's rules, which was promulgated pursuant to section 310(b) of the act, provides, in pertinent part, that within 30 days after the occurrence of a death or legal disability of one who is directly or indirectly in control of a corporation which is a licensee, an application on FCC Form 316 is to be filed requesting consent for involuntary transfer of control of that corporation to another person or entity. Thus, WHDH had an obligation to file such an application not because the licensee corporation had a change in officers but because the change in question involved a transfer of actual control, and of "the power to dominate the management of the corporate affairs" of the licensee corporation. Cf. *Western Gateway Broadcasting Corporation*, 6 R.R. 1325 (1951). That the nature of the control exercised by Akerson (and, preceding him, by Winslow and Choate), constitutes "control" for the purposes of section 310 of the act is beyond question; as early as the *Powel Crosley, Jr.* case [16] the Commission expressed its view that nothing in section 310(b) of the act restricts "control" to a majority of the stock or to any definite percentage of stock. The Commission there stated:

> We believe that a realistic definition of this term [control] includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue.

This policy has been followed in a number of decisions since the *Crosley* case.[17]

46. In our judgment, therefore, WHDH was obligated to file an application for consent to involuntary transfer of control when Winslow and Choate died, and when Choate, in the first instance, and then

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[16] 3 R.R. 6 (1945).

[17] See, e.g., *ABC-Paramount Merger Case*, 8 R.R. 541, *Town and Country Radio, Inc.*, 15 R.R. 1035 (1960), and *WWIZ, Inc.*, 2 R.R. 2d 169, aff'd sub nom. *The Lorain Journal Company* v. *Federal Communication Commission*, 351 F 2d 824, cert. denied, 383 U.S. 967.

Akerson succeeded to the office of president. However, because WHDH has never attempted to misrepresent to, or conceal from, the Commission the facts bearing on ownership and control, the circumstances presented here do not reflect so adversely on the character qualifications of the licensee as to warrant its absolute disqualification. The facts of the unauthorized transfers of control do, however, enter into the comparative evaluation, and in this regard WHDH receives a demerit.

V. Summation

47. Greater Boston II is disqualified and is not entitled to comparative consideration with the other applicants because of its failure to meet the two disqualifying issues which were directed against it. Even if comparative consideration were given to its application, its showings thereunder, as the examiner concluded, are unimpressive.

48. Both Charles River and BBI must be preferred to WHDH under the diversification and integration criteria. In addition, a demerit attaches to the WHDH applicant because of the unauthorized transfers of control which have occurred.

49. As between Charles River and BBI, BBI is entitled to a slight preference on the diversification factor, and to a significant preference on the integration factor. As noted earlier herein, WHDH's past broadcast record and the past broadcast record of Jones of Charles River do not enter into the comparative evaluation for the reasons given in the discussion of such records. We also concluded that no one of the applicants merits a preference over the others regarding the proposed program service.

50. Because of its superiority under the diversification and integration criteria, we conclude that the public interest, convenience, and necessity will be best served by a grant of the application of Boston Broadcasters, Inc., and by denial of the renewal application of WHDH, Inc. and denial of the applications of Charles River Civic Television, Inc. and Greater Boston TV Co., Inc.

51. Accordingly, *It is ordered*, That the unopposed request of Boston Broadcasters, Inc., filed February 6, 1967, for a 1-day extension of time within which to file its reply to exceptions *Is granted.*

52. *It is further ordered*, That the request of Boston Broadcasters, Inc., filed November 6, 1966, for waiver of section 1.277(c) of the rules to permit the filing of briefs exceeding 50 pages in length *Is dismissed* as moot.

53. *It is further ordered*, That the petition of Charles River Civic Television, Inc. for leave to amend its application, filed September 29, 1967, *Is granted*, and the amendment *Is accepted.*

54. *It is further ordered*, That the request for amendment pursuant to section 1.65 of the rules, filed by Boston Broadcasters, Inc. on August 18, 1967, *Is denied.*

55. *It is further ordered*, That the application of Boston Broadcasters, Inc. for a construction permit for a new television broadcast station to operate on channel 5 in Boston, Mass., *Is granted;* that the application of WHDH, Inc. for renewal of license of station WHDH–TV *Is denied;* and that the applications of Charles River Civic Tele-

vision, Inc. and Greater Boston TV Co., Inc. for construction permits for a new television broadcast station to operate on channel 5 in Boston, Mass., *Are denied.*

56. *It is further ordered*, That no date will be specified at this time for termination of the operation of station WHDH-TV inasmuch as portions of these consolidated proceedings, as noted hereinabove, are yet to be determined by the United States Court of Appeals for the District of Columbia Circuit, and as to which the Court retained jurisdiction when it remanded the proceeding for further proceedings consistent with its opinion.

57. *It is further ordered*, That the General Counsel of the Federal Communications Commission *Is directed* to report these proceedings and this decision forthwith to the United States Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

RULINGS ON EXCEPTIONS OF CHARLES RIVER CIVIC TELEVISION, INC.

Exception No.	*Ruling*
3, 4, 5, 7, 8, 11a, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 36, 37, 38, 41, 42, 43, 54, 56, 57, 58, 62, 67, 68, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 93, 94, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 117, 118.	Denied. The examiner's findings adequately and correctly reflect the record.
6, 11b	Denied. The examiner's ruling and the Review Board order complained of are correct.
9, 10, 16, 19, 30, 31, 32, 33, 35, 39, 45, 46, 47, 48, 49, 50, 51, 52, 55, 61, 64, 66, 69, 72, 88, 89, 90, 91, 92, 95, 96, 97, 98, 110, 116, 119.	Denied as immaterial in light of our decision herein.
40	Granted in substance in par. 28 of the decision herein.
44	Denied. The examiner's reasoning is correct.
59	Granted. The findings at par. 260 of the initial decision are corrected to show that Weitzel was born in 1923.
60	Granted. The findings at par. 264 of the initial decision are corrected to show that Judge Brooks was appointed a Special Justice in 1928.
63	Granted, and the finding is corrected accordingly.
65	Denied. The findings complained of are relevant and adequately reflect the record.
73, 104	Denied. The record supports the substance of the examiner's findings.
86, 87	Denied. The examiner's technique of setting forth conflicting contentions in his findings is not fatal inasmuch as the contentions are resolved.

Exception No.	*Ruling*
120, 121, 122	Denied. See pars. 10 and 11 of the decision herein.
123, 131, 146, 150, 155	Denied. The record supports the conclusion of the examiner.
124, 125, 126, 127	Denied. See par. 10 of the decision herein.
128	Granted. See pars. 43–46 of the decision herein.
129	Granted to the extent indicated in pars. 43–46 of the decision herein.
130, 133, 147, 166, 170, 171, 172.	Granted in substance as reflected in the modification of the examiner's conclusions.
132	Denied. The conclusion of the examiner complained of does not carry the implication suggested.
134	Granted, and the examiner's characterization complained of in par. 732 of the initial decision is deleted.
135, 136, 137, 138, 139, 140, 141, 148, 152, 161, 164, 173, 174.	Denied as immaterial.
142, 144, 145, 157, 158, 159, 162, 163, 165.	Denied. The conclusions reached by the examiner are proper.
143	Denied in substance. See par. 22 of the decision herein.
149	Granted to the extent indicated in par. 39 of the decision herein.
151	Denied. The record does not support the requested conclusion.
153	Granted, and the examiner's characterization complained of in par. 766 of the initial decision is deleted.
154, 156, 160	Denied. The requested additional conclusions would add nothing of substance to the decision herein.
167	Granted to the extent indicated in the whole of the decision herein; otherwise denied in light of the decision herein.
168	Granted only to the extent indicated in par. 39 of the decision herein; otherwise denied in light of the decision herein.
169	Denied. The examiner's conclusions are correct and adequately reflect the facts of record. See the ruling on Exception No. 163 of Boston Broadcasters, Inc., deleting certain characterizations made by the examiner in par. 791 of the initial decision.
175	Granted to the extent that WHDH's application is denied; otherwise denied in light of the decision herein.

Exceptions 1, 2 and 53 require no rulings. Par. 1 of the exceptions is a preliminary statement. Pars. 2 and 53 of the exceptions specifically state that no exceptions are taken to certain paragraphs of the initial decision.

RULINGS ON EXCEPTIONS OF BOSTON BROADCASTERS, INC.

1, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15, 16, 18, 19, 21, 22, 23, 25, 26, 27, 28, 30, 31, 34, 36, 37, 41, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 60, 64, 65, 66, 67, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 83, 84, 86, 87, 88, 89.	Denied as immaterial.
2, 3, 12, 17, 20, 24, 29, 32, 33, 38, 43, 44, 54, 55, 57, 59, 61, 62, 63, 68, 69, 70, 90.	Denied. The examiner's findings adequately and correctly reflect the record.

Exception No.	Ruling
6	Denied. A portion of the requested findings is made at par. 119 of the initial decision. The remainder of the requested findings are immaterial.
35, 76	Granted. The examiner's finding is accordingly corrected.
39	Granted to the extent indicated in par. 28 of the decision herein; otherwise denied as immaterial.
40, 82, 85	Denied. The findings complained of are relevant and material.
42	Denied. The examiner's reasoning is correct.
58	Granted in substance in par. 25 of the decision herein.
91	Granted. The finding complained of is modified to show that the petition to reopen the record, filed by Greater Boston Television Corp., to show that Michael Henry is no longer connected with that applicant was denied by the Commission.
92	Denied. The examiner's conclusion is correct. See par. 11 of the decision herein.
93, 94	Denied. See par. 10 of the decision herein.
95, 96	Granted. See pars. 43–46 of the decision herein.
97	Granted to the extent indicated in pars. 43–46 of the decision herein; otherwise denied as immaterial.
98, 99, 102, 103, 104, 129, 130, 131, 132, 133, 135, 136, 144, 146, 152, 156, 157, 158, 164, 165, 166, 167, 170, 171.	Granted in substance as reflected in the modification of the examiner's conclusions.
100, 101 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 118, 119, 120, 122, 123, 125, 126, 127, 134, 141, 143, 145, 147, 149, 154, 155, 162, 168, 169.	Denied as immaterial.
124, 148, 150, 151	Denied. The record supports the conclusions reached by the examiner.
117	Denied in substance. See par. 22 of the decision herein.
121	Granted in substance in par. 29 of the decision herein.
128	Granted in part as reflected in pars. 43–46 of the decision herein; otherwise denied in light of the whole of the decision herein.
137, 139	Denied. See par. 39 of the decision herein.
138	Granted and the complained of phrase in par. 762 of the examiner's initial decision is deleted.
140	Granted to the extent that the complained of phrase in par. 763 of the examiner's initial decision is deleted; otherwise denied as lacking decisional significance.
142	Granted to the extent that the examiner's characterizations relating to Boston Broadcasters, Inc.'s proposals are deleted; otherwise denied in light of our decision herein.
153	Granted to the extent that the examiner's characterization in par. 786 of the initial decision, which is complained of, is deleted; otherwise denied as immaterial.
159	Denied. See par. 21 of the decision herein.
160	Granted to the extent that the examiner's conclusions have been modified with respect to WHDH, Inc.

Exception No.	*Ruling*
161	Granted to the extent that the examiner's characterizations respecting Boston Broadcasters, Inc. in par. 790 of the initial decision are deleted; otherwise denied in light of par. 39 of the decision herein.
163	Granted, and the characterizations complained of in par. 791 of the examiner's initial decision are deleted.
172	Granted to the extent that the examiner's conclusions have been modified; otherwise denied in light of the whole of the decision herein.
173, 174, 175	Denied. The examiner's rulings complained of are correct and are affirmed.
176	Granted.

RULING ON THE SINGLE EXCEPTION OF THE CHIEF, BROADCAST BUREAU

1	Granted. See pars. 43–46, inclusive, of the decision herein.

RULINGS ON THE EXCEPTIONS OF GREATER BOSTON TELEVISION CORP.

1, 2, 3, 4, 5, 6	Denied, for the reasons stated in the decision herein.

RULINGS ON THE EXCEPTIONS OF GREATER BOSTON TV CO., INC.

1, 2, 4	Denied. The conclusions of the examiner complained of are correct.
3	Denied. See par. 14 of the decision herein.
5	Granted to the extent that the application of WHDH is denied; otherwise denied, in light of the decision herein.

RULINGS ON EXCEPTIONS OF WHDH, INC.

1a, 1b, 1c, 1d	Granted. The examiner's findings are accordingly modified.
1e, 1f	Denied. The exceptions do not conform to section 1.277(a) of the rules in that the paragraph references are imprecise.
2	Denied as immaterial. Although the exception is addressed to par. 70 of the initial decision, this appears to be in error since the topic is covered in par. 154, and not in par. 70.
3	Denied as immaterial.
4	Denied. The findings of the examiner adequately and correctly reflect the record.
5, 6, 7, 8, 9, 10, 11, 12	Denied as immaterial.

To preserve its record, WHDH, Inc. noted formally that it is carrying forward its exceptions on the record to the rulings of the examiner, and excepts to the failure to adopt all of the proposed findings and conclusions of WHDH. However, this procedure is inconsistent with the provisions of section 1.277(a) of the rules which require that exceptions "shall point out with particularity alleged errors in the decision or ruling and shall contain specific references to the page or pages of the transcript of hearing, exhibit, or order if any on which the exception is based."

STATEMENT OF CHAIRMAN HYDE

I have abstained from voting in this case. This case has roots extending far back and has always been a difficult one, at least for me.

On the first round I voted against WHDH, Inc. (see 22 FCC 767,

13 R.R. 507). On the second round, in light of certain changed circumstances, I cast my vote for WHDH, Inc. (see 33 FCC 449, 24 R.R. 255). This is now the third round and it is no less difficult for me to choose among these competing applicants.

In view of my previous participation and finally the fact that my vote is not essential to resolution of the matter, I have simply abstained.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent to the grant of a construction permit to Boston Broadcasters, Inc., for channel 5 in Boston and vote to renew the application of WHDH, Inc., for this channel. This is a comparative proceeding between a renewal applicant and three new competing applicants. My major disagreement with the majority is the basis for comparing these four applications. This comparative evaluation is likewise the basic reason assigned by the majority for disagreeing with the Hearing Examiner's conclusion that WHDH, Inc., should be preferred.

The Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901, specifically holds that such policy is to apply to new applications and "not with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." Chairman Hyde summed up the difficulties in applying this policy to renewals and competing applicants in his dissent to the *Policy Statement* as follows:

*** * * The filing of a new application—organized accordingly to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. Is the Commission now ready to read out established broadcasters, not locally owned, but otherwise without blemish in favor of the locally-owned applicants? Is the Commission now ready to read out established broadcasters who are without blemish, except that they utilize competent personnel who do not have an ownership interest, in favor of applicants who propose to operate the facilities personally? Is the Commission ready to accept a new applicant formed to meet this preconceived mold in preference to an existing broadcaster who does not fit into such mold regardless of other circumstances?**

I reluctantly concurred in the policy statement and stated then, and still believe, that the preferred applicant could be one with newspaper and CATV interests. For this reason, I specifically reserved my right as to the weight to be assigned to the various criteria in a given case. This is such a case. Subsequent decisions of the Commission [1] have further defined the policy with respect to renewals versus competing applications but only with respect to the admissibility of evidence pursuant to the policy but not the weight to be afforded such evidence. The majority here holds in effect that the weight to be afforded the comparative factors in a renewal application is the same as a new application. I believe that the weight to be given such evidence is substantially reduced in view of the renewal applicant's existing track record. To hold otherwise would permit a new applicant to submit a "blue sky" proposal tailor made to secure every comparative advantage while the existing licensee must reap the demerits of hand-to-hand

[1] *Seven (7) League Productions, Inc.*, 1 FCC 2d 1597 (1965) and *RKO General, Inc.* (KHJ-TV), FCC 66-503.

combat in the business world, and the community it serves, in which it is virtually impossible to operate without error or complaint, if for no other reason than there are insufficient hours in the broadcast day with which to satisfy all the desires of the public. A real question is raised in my mind whether the new applicant in this situation is seeking to satisfy the needs of the community or the policy of the Commission.

One further comment is required on a renewal applicant which is unlike the case where all applicants are initially seeking an outlet. Vast expenditures for facilities and goodwill have been made which it would be inequitable to declare forfeited unless the licensee has operated against the public interest.

As with the majority, I too accept the Hearing Examiner's findings of fact. In addition, with several minor exceptions, I also accept his conclusions.

The majority assigns comparative decisional significance to the diversification and integration criteria with some minor demerit to WHDH, Inc. for unauthorized transfer of control.

The record shows that all of the WHDH, Inc. stock is owned by the Boston Herald-Traveler Corp. The Herald-Traveler publishes two daily and one Sunday newspaper. Five other newspapers are published in Boston, including the Christian Science Monitor and none of the other newspapers have an ownership interest in an AM, FM or TV station. After the record was closed, the Boston Globe acquired a 50-percent interest[2] in the New Boston Television, Inc., channel 38, in which Kaiser Broadcasting Co. also has a 50-percent interest. WHDH–FM is one of 12 FM stations in Boston and the immediate vicinity. WHDH–AM is one of three 50-kw stations, and 8 other AM stations with power up to 5 kw, which includes 3 daytime-only stations, in Boston and vicinity. Boston has 3 commercial VHF–TV stations, including WHDH–TV, 2 UHF commercial stations[3] and a VHF educational station. The Herald-Traveler's average combined daily circulation was 23 percent of the market and the paper is ranked first in display linage. Herald-Traveler also has a 50-percent ownership of Entron, Inc., which concern manufactures CATV equipment and has substantial ownership in 5 systems all of which are completely removed from the Boston market.

I support, in principle, the policy that an applicant's interest in other mass communications media must be considered in our comparative analysis. The comparative weight to be assigned such evidence drops sharply where a healthy competitive situation exists from a number of other nonaffiliated media in the same market. To hold otherwise would mean that certain categories of applicants (such as newspapers) would be automatically precluded.

WHDH, Inc. has a renewal of license application before us. This license was granted without condition (except for the 4-month period) and, of necessity, was found qualified under all applicable sections of our act and rules. It was further clear that, as a renewal applicant,

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[2] This 50-percent interest was further reduced to 20 percent on October 21, 1968 (File No. BTC–5702).

[3] The record reflects one UHF station. Official notice of our files shows 2 UHF stations—WSBK–TV, ch. 38, Boston and WKBG–TV, ch. 56, Cambridge-Boston.

WHDH, Inc. could continue to operate the station until this proceeding is terminated under the Administrative Procedure Act. This being the case, weight must also be given "to the clear advantage of continuing an established and excellent service of the existing station" *Hearst Radio, Inc.* (WBAL), 6 R.R. 994 (1951); *Wabash Valley Broadcasting Corporation* (WTHI–TV), 35 FCC 677, 1 R.R. 2d 573 (1963). The policy statement must be interpreted in the light of these holdings particularly when it is recognized that the policy statement sets forth procedures of a general nature which "cannot dispose of all problems or decide cases in advance."

A similar weighing process must also be applied to the preference the majority awards to BBI on integration. While on paper, BBI shows up better than WHDH, Inc. on integration, this must be weighed in the light of the record which shows that WHDH, Inc. has done an above-average job in the past. This, to me, is a more accurate gage of the future than the theory, which I recognize as valid for new applicants, that an owner-manager who spends full time at the station should provide better public service than the absentee owner or one who devotes only part time to the station.

The majority does find some blemish on the WHDH, Inc., record and other matters are referred to but not resolved. The majority opinion does refer to ex parte contacts but this issue is not resolved. This nevertheless leaves a disparaging connotation as WHDH, Inc. is now in the position of being charged with a serious offense but its guilt or innocence is forever left in limbo. Both Special Examiner Horace Stern and Hearing Examiner Herbert Sharfman have reviewed the issue of alleged WHDH, Inc. ex parte contacts. Hearing Examiner Stern, without reservation, resolved this issue in favor of WHDH, Inc. Hearing Examiner Sharfman concluded that the ex parte matter was no longer a comparative factor. Reference is made to WHDH's failure to editorialize. We have no rule which requires a station to editorialize. Rather this responsibility ultimately devolves upon the individual licensee, *Commission Policy on Programing*, 20 R.R. 1901, FCC 60–970.

The majority has refused to consider the WHDH past broadcast record because there is no clear way to compare promise vs. performance. This is so because the station obtained a network affiliate before it went on the air in 1957 and the network programing was not shown in the application. I have reviewed the programing of WHDH–TV as shown in the record and I find it above average; for example, 22 percent local live programing. However, assuming the WHDH–TV past programing is average, as found by the majority, the new application programing is not found to be above average. In such a case, preference should be given to the known past rather than speculative future promises.

The majority places some significant emphasis on a news scoop of the Herald-Traveler which was not given to WHDH–TV and the fact that in the 1954 hearing Herald-Traveler testified that it would not withhold news from WHDH–TV just because it published a newspaper. The record is also clear that the Herald-Traveler Board of Directors is not a center of de facto or actual control over WHDH, Inc.

Rather than this incident demonstrating the evil of newspaper-TV station ownership, it could be concluded on this record that the newspaper and TV station, for all operational purposes, were independent of each other.

I agree with the majority in its conclusion that a de facto [4] change of control of WHDH did take place. There was no attempt to mislead or deceive the Commission and this violation is not the type which should be considered either as an absolute or comparative disqualification.

Based on all the above, and the entire record in the proceeding, I find that the weight to be given the facts in this case, which both the majority and this dissent accept, dictate a grant of the renewal to WHDH, Inc.

I am very much afraid that this decision will be widely interpreted as an absolute disqualification for license renewal of a newspaper owned facility in the same market. Competing applications can be anticipated against most of these owners at renewal time.[5]

Channel 5

[In the matter of WHDH, Inc. * * * docket No. 8739, et al.]

CONCURRING STATEMENT OF COMMISSIONER NICHOLAS JOHNSON

This case has a long and unfortunate history. We are essentially reconsidering matters that were first addressed by this Commission years before I came. Normally I would not participate in such a case. In this instance, however, my participation is necessary to constitute a working majority for decision. Accordingly, I concur in today's decision.

I feel no passion about the selection of the ultimate winner. As the opinion makes clear, a weighing of the merits of Charles River Civic Television, Inc., and Boston Broadcasters, Inc., is not overwhelming. And, as I have indicated elsewhere, I do not believe the comparative hearing process an especially useful device for disposing of matters of this significance. *Farragut Television Corp.*, 8 FCC 2d 279, 285 (1967).

But this case is significant for other reasons. In America's 11 largest cities there is not a single network-affiliated VHF television station that is independently and locally owned. They are all owned by the networks, multiple station owners, or major local newspapers. The decision to not award channel 5 to the Herald-Traveler is supported by good and sufficient reasons beyond the desire to promote diversity

[4] Both the Hearing Examiner and the majority find that de jure control of WHDH, Inc. was unchanged.

[5] The 81st Congress and the 82d Congress considered a so-called "Newspaper Amendment" to the Communications Act. The then chairman of the FCC indicated at the hearing on this bill that "The principal intent of the section is, of course, to outlaw the possibility of any rule excluding newspaper owners from owning radio stations. There is no objection to this section." (Hearings before Subcommittee of Committee on Foreign and Interstate Commerce on S. 1973, 81st Cong., 1st sess. (1949), pp. 20–21.) The proposed amendment was not adopted because "It should be distinctly understood that in eliminating this section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure. (S. Rept. 751, 81st Cong., 1st sess. 2 (1950).)

of media ownership in Boston. And I take no present position on the merits of continued newspaper ownership of broadcasting properties in markets where there is competing media. But I do think it is healthy to have at least one station among these politically powerful 33 network-affiliated properties in the major markets that is truly locally owned, and managed independently of the other major local mass media. It is a step, however small, back toward the Commission's often professed but seldom evidenced belief in the benefits of local ownership and media diversity. It is, at the very least, an interesting experiment which will be watched carefully by many.

Nor is the significance of this case limited to the impact on media ownership in Boston. For the Commission also speaks generally of situations in which a new competitor is seeking the right to broadcast as against a present broadcast license holder. We suggest that the standards at renewal time ought to be the same standards that would prevail if all applicants were new applicants. In doing so the Commission removes an ambiguity in its comparative hearing standards and procedures. In the words of the order:

> We believe that this approach is sound, for otherwise new applicants competing with a renewal applicant would be placed at a disadvantage if the renewal applicant entered the contest with a built-in lead arising from the fact that it has a record as an operating station. More importantly, the public interest is better served when the foundations for determining the best practicable service, as between a renewal and new applicant, are more nearly equal at their outset. (par. 19)

Cases are overruled where licensees with substantial media concentrations were able to retain their license under a renewal comparative challenge. The door is thus opened for local citizens to challenge media giants in their local community at renewal time with some hope for success before the licensing agency where previously the only response had been a blind reaffirmation of the present license holder.

2. Initial Decision of Hearing Examiner, Adopted August 10, 1966, Released August 15, 1966 (16 FCC 2d 29)

FCC 66D–47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WHDH, INC., BOSTON, MASS.	Docket No. 8739 File No. BPCT–248
GREATER BOSTON TELEVISION CORP., BOSTON, MASS. For Construction Permits for New Television Stations (Channel 5)	Docket No. 11070 File No. BPCT–1657
In re Applications of WHDH, INC. (WHDH–TV), BOSTON, MASS. For Renewal of License	Docket No. 15204 File No. BRCT–530
CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS.	Docket No. 15205 File No. BPCT–3164
BOSTON BROADCASTERS, INC., BOSTON, MASS.	Docket No. 15206 File No. BPCT–3170
GREATER BOSTON TV CO., INC., BOSTON, MASS. For Construction Permits for New VHF Television Broadcast Stations	Docket No. 15207 File No. BPCT–3171

APPEARANCES

William J. Dempsey, *William C. Koplovitz*, *Harry J. Ockershausen*, and *J. Richard Carr* (Dempsey & Koplovitz) for WHDH, Inc.; *J. Joseph Maloney, Jr.* and *Joseph F. Tubridy* for Greater Boston Television Corp. and Greater Boston TV Co., Inc.; *Harry M. Plotkin*, *Thomas Schattenfield*, and *George H. Shapiro* (Arent, Fox, Kintner, Plotkin & Kahn) for Charles River Civic Television, Inc.; *Benito Gaguine*, *Jack P. Blume*, and *Donald E. Ward* (Fly, Shuebruk, Blume & Gaguine) for Boston Broadcasters, Inc.; and *John F. Reilly*, *William G. Secrest*, *Thomas B. Fitzpatrick*, and *Morton I. Berfield* for the Chief, Broadcast Bureau, Federal Communications Commission. (*Paul Dobin* (Cohn & Marks) represented witnesses Ruan and Rosenfield; and *Arthur I. Rosett* (Patterson, Belknap & Webb) represented witnesses Miller and Brumley.)

INITIAL DECISION OF HEARING EXAMINER HERBERT SHARFMAN

(Adopted August 10, 1966)

PRELIMINARY STATEMENT

1. This case involves applications for authority to operate a commercial VHF television station on channel 5, Boston. The proceeding includes two applications for initial authority (WHDH, Inc., docket No. 8739; and Greater Boston Television Corp., (Greater Boston I),

docket No. 11070) which have been pending for more than 10 years, and neither of which has been finally disposed of. But the present phase began on October 24, 1963, when by order released October 29 the Commission designated for hearing the renewal application of WHDH and the initial applications for the same facilities of Charles River, Boston Broadcasters, Inc. (BBI), and Greater Boston TV Co., Inc. (Greater Boston II), docket Nos. 15204–7. For a clearer understanding of the consolidation into one proceeding of the original applications of WHDH and Greater Boston I, the WHDH renewal application, and the other competing applications for initial authorizations, some background is necessary. (WHDH has excepted to the Commission's waiver of the rules to permit participation by Greater Boston II.)

2. On June 21, 1954, the Commission designated for hearing the mutually exclusive applications for Boston TV channel 5 of WHDH, Greater Boston I, Massachusetts Bay Telecasters, Inc., and Allen B. DuMont Laboratories, Inc. Hearings began on November 8, 1954, and the record was closed on February 4, 1955. The hearing examiner issued an initial decision on January 4, 1956, in favor of Greater Boston I. After exceptions by the other parties and oral argument, the Commission, on April 25, 1957, released a decision, 22 FCC 767, 13 R.R. 507, granting the WHDH application and denying the other applications. Greater Boston I and Massachusetts Bay appealed this decision to the court of appeals. On July 31, 1958, the court of appeals, on its own motion, remanded the proceeding to the Commission for further hearings on ex parte contacts, meanwhile retaining jurisdiction of the case. *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55, 17 R.R. 2083. The court, however, found no error on the comparative aspects of the case in the award to WHDH.

3. The Commission adopted an order on December 4, 1958, designating the channel 5 case for hearing on the question of ex parte contacts, pursuant to the remand order. Special Hearing Examiner Horace Stern, by initial decision released September 23, 1959, 18 R.R. 1101, 1116, concluded that "the grant of the construction permit for channel 5 in Boston is neither void ab initio nor voidable, and therefore action should not be taken to set it aside because of facts herein found." But on exceptions to Judge Stern's initial decision, the Commission released a decision on July 14, 1960, 29 FCC 204, 20 R.R. 395, setting aside the grant of the channel 5 construction permit to WHDH, but granting it "special temporary authority to continue operation on channel 5, Boston, Mass." The Commission found that Robert Choate, president of WHDH, Inc. and vice president and a director of The Boston Herald-Traveler Corp., its parent company, was "not guilty of offering any material inducement to influence the outcome of the proceeding or of actually arguing the merits of the case ex parte, but rather of attempting to establish a personal relationship with a member of the Commission with the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of WHDH in the event of a close decision [;] and of attempting to present to a member of the Commission ex parte a legal brief on a

matter so intimately concerned with the then-pending hearing that he must have been aware of the applicability of the general problem discussed therein to the specific issue at stake in the Boston hearing." Although Mr. Choate's conduct was sufficient to void the grant to WHDH, the Commission stated that "while [it reflected] adversely on WHDH and [weakened] its comparative position vis-a-vis its competitors in the proceeding, [it] does not demonstrate such a complete lack of character as to require absolute disqualification" (20 R.R. at 404–5).

4. On November 4, 1960, the Commission adopted a report and recommendation to the court of appeals. It recommended that the court remand the entire case to the Commission so that it might set aside the grant to WHDH, reevaluate the comparative position of the applicants on a supplemented record, and make a new determination. The report adopted the findings and conclusions of the decision of July 14, 1960 (par. 3, above). By order released January 19, 1961 (*Massachusetts Bay Telecasters, Inc.* v. *FCC*, 111 U.S. App. D.C. 144, 295 F. 2d 131, 20 R.R. 2096a, cert. den., 366 U.S. 918) the court approved the Commission's findings and recommendation; vacated the Commission's order of April 25, 1957 (par. 2, above); and remanded the proceedings "to the Commission in order that it may reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission shall deem appropriate."

5. On the remand proceeding ordered by the court of appeals the Commission permitted the parties to submit briefs, and to present their claims at an oral argument on October 16, 1961.

6. The Commission adopted a new decision on September 25, 1962, released September 26, 33 FCC 449, 24 R.R. 255. The majority ruled that "except insofar as supplemented and modified herein and by the Commission's decision of July 14, 1960, the Commission's decision of April 24, 1957 [released April 25, 1957, par. 2, above], is affirmed; the grant of the application of WHDH, Inc., for a permit to construct a new television station on channel 5 in Boston, Mass., is reinstated; the applications of Greater Boston Television Corp. and Massachusetts Bay Telecasters, Inc., are denied [DuMont, one of the original competing applicants, had dismissed its application]; and the applications of WHDH, Inc. (BLCT–761 and BLCT–762) for licenses to cover construction permit are granted, the licenses to be issued for a period of 4 months only." It was noted (24 R.R. 258) that in its "Decision of April 24, 1957, the Commission had also [that is, in addition to finding WHDH superior to Massachusetts Bay] accorded full comparison to the proposals of WHDH and Greater Boston and found WHDH to be superior * * *. However, for reasons stated in the decision of July 14, 1960, the Commission was, and remains, of the view that while the comparative standing of WHDH was compromised [by Mr. Choate's ex parte contacts] it was not destroyed, and the corporation continued eligible for comparative evaluation." Main-

taining the prior preference for WHDH over Greater Boston I, the majority said (24 R.R. at 260):

> It is apparent that the ultimate selection lies, as it lay in the Commission's deliberations preceding the 1957 decision, between the preference accorded WHDH in the areas of past broadcast experience and record and that accorded Greater Boston on the factor of diversification of mass media of communications. We believe that the public interest would be better served by a grant to WHDH, for the factors on which it has been preferred demonstrate a likelihood of a continuing operation in the public interest, while the factor on which Greater Boston has demonstrated superiority, although concerned with an important Commission policy, is of greatly diminished significance in the circumstances of this case * * *. As will appear in the decretal clause which follows, we are reinstating the grant of the application of WHDH, Inc. for a permit to construct a new television station on channel 5 in Boston. WHDH has been operating its station on channel 5 for nearly 5 years under various temporary authorizations. It has had pending since November 26, 1957, an application (BLCT-761) for license for operation of such station, and an application (BLCT-762) for authorization of an alternate main transmitter and antenna. Action upon the application is appropriate at this time, for clearly the ordinary procedures providing a period of time within which to commence construction of the station and for completion of construction are inapplicable in light of the fact that the station has been operating for nearly 5 years. In the usual situation, a license application would be granted for a term of 3 years. It is within our authority, however, to grant a license for a lesser term than 3 years. Even though the inroads made by WHDH upon the rules governing fair and orderly adjudication have been concluded to result in compromise and impairment of comparative standing only, the Commission's concern with these matters extends to the point that it believes that the public interest would be served in the circumstances here shown by granting the license application of WHDH, Inc. for a term of 4 months only.

7. Both Greater Boston I and WHDH appealed from the Commission's decision of September 25, 1962. On December 21, 1963, after the appeals had been argued but before the court had announced its decision, Robert Choate died.

8. In the meantime, the Commission had issued its order of December 19, 1962, 25 R.R. 80. With its decision of September 25, 1962, 24 R.R. 255, under consideration, it observed that it had there granted WHDH a license for 4 months dating from September 25; that WHDH had filed an application for renewal of its channel 5 license on October 26, 1962; and that in the interest of "orderly procedure, as was done in similar instances, a definite date should be established within which competing applications for construction permits for new television broadcast stations on channel 5 may be filed with assurance of comparative consideration. (Fn. Such date is not a cut-off date after which applications cannot be filed; the date simply delineates the so-called 'sure' period within which the prospective applicant need not fear being cut off by a prior Commission action granting or designating.)" The Commission, on its own motion, directed "that, channel 5, Boston, Mass., be available for the filing of applications for construction permits for new television broadcast stations beginning January 26, 1963, and ending March 26, 1963, Commission's rules to the contrary, if any, notwithstanding." The Commission reaffirmed the order on March 6, 1963, in denying WHDH's petition for reconsideration.

9. The only applicants remaining in what may be called the first proceeding—the initial license competition of four applicants—are

Greater Boston I and WHDH. It has already been mentioned that DuMont, one of the four, dismissed its application; and Massachusetts Bay, another, has also dropped out. (Originally there were six, but two others, CBS and Post, had been earlier dismissed.) The second hearing proceeding began after the filing of WHDH's renewal application on October 25, 1962, when, following the filing of applications for channel 5 in March 1963, within the sure period, by Charles River, BBI, and Greater Boston II, the Commission, on October 24, 1963, released October 29, by memorandum opinion and order designated all four applications for hearing on standard comparative issues (1 R.R. 2d 468).

10. On February 3, 1964, on Charles River's petition, the review board added the following issues in the second proceeding with respect to Greater Boston II:

To determine what efforts have been made by Greater Boston TV Co., Inc., to ascertain the programing needs and interests of the area its application proposes to serve and the manner in which it proposes to meet such needs and interests.

To determine whether Greater Boston TV Co., Inc. has reasonable assurance of being able to secure its proposed antenna site.

11. On March 11, 1964 (2 R.R. 2d 17); April 14, 1964 (2 R.R. 2d 125), and August 4, 1964 (3 R.R. 2d 579), the Review Board added the following issues in the second proceeding:

To determine, with respect to the stockholders, directors, and officers of WHDH, Inc.'s parent corporation, the Boston Herald-Traveler Corp., the information required by section II of FCC form 301, and, in light of the evidence adduced to determine whether WHDH, Inc. is legally qualified.

To determine whether a grant of the application of WHDH, Inc. would be consistent with the provisions of section 73.636 of the Commission's rules.

To determine whether a grant of the application of WHDH, Inc. would be consistent with the provisions of section 310(a)(5) of the Communications Act of 1934, as amended.

To determine whether the control of WHDH, Inc., and the Boston Herald-Traveler Corp. has been transferred without Commission authorization in violation of section 310(b) of the Communications Act.

To determine, in view of the facts developed under the foregoing issue, [transfer] wh[illegible]er WHDH, Inc. possesses the requisite character qualifications to be a Commi[illegible]on licensee.

12. In *Greater Boston Television Corp.* v. *FCC*, 334 F. 2d 552, 2 R.R. 2d 2040, the court of appeals, on the appeal from the Commission's September 1962 decision (see par. 7, above), on April 16, 1964, remanded the first proceeding to the Commission to allow it to assess the effect of Mr. Choate's death on its original television award to WHDH. The court said (2 R.R. 2d at 2041):

The court is now advised that Mr. Choate died on December 21, 1963, after these appeals had been argued. We conclude that under such circumstances the proceedings should be remanded to afford the Commission to consider whether and to what extent these changed conditions affect the awards to WHDH [fn. omitted]. This is indicated in a case where, as here, awards appear to have been made upon a close margin in a closely contested comparative consideration and because the Commission's findings reflect that the late Mr. Choate was an important factor favorable to WHDH and also was the cause of the demerit against that applicant. Obviously the resultant net assay is initially before the Commission.

* * * * * * *

The proceeding for renewal of WHDH's license (Fn. Of course the renewal proceedings assume an initial license to WHDH. If upon reconsideration upon

this remand the Commission decides not to award the initial license to WHDH, the renewal proceedings lose their appropriateness.) is also before the Commission (Fn. * * * A comparative hearing upon the renewal application and its competitors has been set and is under way before the Commission.); that subject is not now and has never been before this court. Clearly whatever changes may be wrought in the affairs and prospects of WHDH by the death of Mr. Choate may be pertinent both to the reconsideration of the initial awards and to the renewal proceedings. The public interest determinations, as they rest on the relative preferences and demerits of WHDH, now must be considered in terms of the absence of Mr. Choate.

Under such circumstances, if the Commission deems it to be in the public interest for the sake of efficiency, economy and expedition to combine some or all of the features of these two proceedings into one proceeding, or to conduct the two simultaneously, the Commission is hereby authorized to consider such procedure as within the authority of this remand (Fn. * * * but it also appears to us that, since the evidence as to the merits and demerits of WHDH, absent Mr. Choate, on all the various features of the operation material to the award may be long and involved, and since that evidence might well be material to both proceedings (remanded and renewal), the Commission could appropriately adopt a procedure which would permit the taking of this evidence only once. The same might apply to any other evidence, and any argument, common to both proceedings.) The court will retain jurisdiction of the cases.

13. Pursuant to the mandate of the court of appeals, the Commission, by memorandum opinion and order dated May 6, 1964, released May 8, consolidated "the reopened proceedings in dockets Nos. 8739 and 11070 with the proceedings in dockets Nos. 15204–15207 for the limited purpose of taking evidence as to the effect of Choate's death on the WHDH applications in these proceedings." The Commission ordered:

That the record in the proceeding in dockets Nos. 8739 and 11070 *Is reopened* and that this proceeding *Is remanded* to Hearing Examiner Sharfman for hearing and initial decision on the following issues:

1. To determine the changes made by WHDH, Inc. as a result of the death of Robert B. Choate.

2. To determine in light of the evidence adduced pursuant to the above issue and the absence of Mr. Choate, whether the Commission's decision of September 25, 1962 in dockets Nos. 8739 and 11070 should be modified, and, if so, in what respects such decision should be modified.

* * * That WHDH, Inc. *Is directed* to amend its application in docket No. 15204 (file No. BPCT-530) to reflect the absence of Robert B. Choate.

* * * That the reopened proceedings in dockets Nos. 8739 and 11070 and the proceedings in dockets Nos. 15204–15207 *Are consolidated* to the limited extent described above.

14. Before consolidation there had been five prehearing conferences; there were three additional prehearing conferences between May 11 and June 15, 1964. All applicants exchanged exhibits on the comparative issues in dockets Nos. 15204–7 on March 23, 1964. Later WHDH furnished exhibits on the noncomparative aspects of its case and on the remand issues from the first proceeding. Hearings began on June 27, 1964, and were held on 123 days until July 16, 1965, when the record was closed. It was reopened to receive a stipulation and reclosed on January 7, 1966; and again reopened on June 17, 1966. It was finally closed on July 28, 1966.

15. Proposed findings of fact and conclusions have been submitted in four steps, the last, after several extensions of intermediate and final steps, on July 18, 1966. The Broadcast Bureau filings were directed to the "noncomparative" portion of the proceeding (as will appear,

however, among other things the bureau recommended that WHDH's failure to obtain prior Commission approval for transfer of control weigh against it in a comparison).

FINDINGS OF FACT

16. WHDH, Inc. is a Massachusetts corporation, originally formed as Matheson Radio Corp. All of WHDH's stock is owned by The Boston Herald-Traveler Corp., and is now voted by George E. Akerson, Herald-Traveler's president. WHDH is the licensee of WHDH–TV, channel 5, Boston, which operates with maximum permissible power and an overall antenna height of 1249 feet (1140 feet above average terrain). WHDH–TV's transmitter and antenna are at Newton, Mass., and its main studios on Morrissey Boulevard, Boston. WHDH, Inc. is also the licensee of WHDH, a 50-kw. AM station operating on 850 kc., DA–2, with transmitter and antenna near Needham, Mass., and its main studios on Morrissey Boulevard; and of WHDH–FM, which operates on channel 233 with maximum facilities. The FM station's transmitter and antenna are in the transmitter building and on the tower of WHDH–TV, and its main studio is on Morrissey Boulevard. Broadcasting is the only business of WHDH, Inc.

17. The officers and directors of WHDH, Inc. are:

George E. Akerson—President and director.
William B. McGrath—Executive vice president and director.
Alexander M. Tanger—Senior vice president and director.
Roger P. Talmadge—Treasurer and clerk (secretary) and director.
Robert B. Cheyne—Vice president.
John M. Day—Vice president.
Charles A. Hart—Assistant treasurer.

18. On June 16, 1954, the date on which WHDH's application for a construction permit for a new Boston television station on channel 5 was designated for hearing, the officers and directors of WHDH, Inc. were:

Robert B. Choate—President and director.
William B. McGrath—Vice president and director.
Roger P. Talmadge—Treasurer and director.
Francis A. Wood—Clerk and director.
Lawrence J. O'Connell—Director.

19. On October 24, 1963, when WHDH–TV's application for renewal of license was designated for hearing along with the applications of Charles River Civic Television, Inc., Boston Broadcasters Inc., and Greater Boston TV Co., Inc., the officers and directors of WHDH, Inc. were:

Robert B. Choate—President and director.
William B. McGrath—Vice president and director.
Alexander M. Tanger—Vice president and director.
Roger P. Talmadge—Treasurer, clerk, and director.
George E. Akerson—Director.

20. Mr. Akerson was elected president of WHDH, Inc. on December 26, 1963, to succeed Mr. Choate. At the same meeting, Mr. McGrath was elected executive vice president, a new office.

21. The WHDH board of directors meets from one to three times a year, and only (apart from the annual meeting) when formal corporate action on a matter is required. Discussion at the meetings is perfunctory. A slate of officers is drawn up at the annual stockholders' meeting. (At a recent meeting Mr. Akerson cast all the votes for the slate.) Immediately after the stockholders' meeting the WHDH board convenes for its annual meeting, where reading of the minutes is usually waived and the slate is elected. Before the WHDH board declares a dividend, Mr. Talmadge gives it an informal revenue report which takes a minute or two. Since Mr. Choate's death on December 21, 1963, and up to the close of this record, there was no discussion at WHDH directors' meetings about the election of a director in his place. Operating and programing policies of the WHDH stations are not discussed at the meetings. When Mr. Akerson was elected president of WHDH his salary from WHDH was never submitted to the board for approval. Matters such as those involving advertising rate increases and network preemption and network change have not been submitted to the board for discussion.

22. George E. Akerson, President, has been with WHDH since 1946. He lives in Boston. He has been a member of the WHDH, Inc. board of directors since March 21, 1961. Mr. Akerson is also president of WHDH's parent company, The Boston Herald-Traveler Corp., a position to which he was elected on October 18, 1963, to succeed Mr. Choate, who was elected chairman of the Herald-Traveler board; and he is publisher of the Herald-Traveler newspapers. He has been a Herald-Traveler director since February 17, 1961. He owns 10,171 shares of Herald-Traveler stock.

23. Mr. Akerson was born in Minneapolis, Minn., on April 20, 1918. He attended Harvard College for 4 years and in 1953 the advanced management course at Harvard Business School. He joined the Herald-Traveler while a Harvard undergraduate, working as a copy boy, reporter, and rewrite man until his enlistment as an Army Air Corps cadet in September 1940. He was awarded the Air Medal with clusters and the Distinguished Flying Cross, and was discharged from service as a Lieutenant Colonel (Air Force Reserve). Following military discharge he rejoined the Herald-Traveler. For a time he was advertising director. In the fall of 1945 he became assistant to the publisher, Mr. Choate; in late 1960 or early 1961 his title was changed to assistant publisher.

24. As assistant to Mr. Choate he performed the "many, many duties that were assigned to me by Mr. Choate" (tr. 17027). These included various specific assignments in connection with the operation of WHDH. For instance, he was sent to New York City by Mr. Choate to investigate Mr. McGrath and to recommend whether he should be hired as station manager and he helped Mr. McGrath to break in; he "developed the old concept of the skyway patrol, [and] flew the first missions in the airplane myself with Mr. McGrath as announcer to determine its feasibility" (tr. 17028); when WHDH–AM was bought he organized "the whole news setup" (tr. 17032); he assisted in the negotiations to put a television antenna on top of the John Hancock Building; he worked with A. Earl Cullum in obtaining airspace approval of the

Newton Triangle antenna farm; he coordinated the preparation for and filing of the WHDH–TV application and its amendments; and he supervised construction of the television tower. He consulted frequently with Mr. McGrath about radio and television operation. He personally covered the Electra crash in Boston, a story which won a United Press Best Story Award "because we, in effect, scooped all the other stations on live, on-camera interviews with survivors through my placing these in specific locations" (tr. 17036). He originated a documentary camera tour of Walpole State Prison, "going into all sorts of penology problems" (tr. 17037). He remembered "participating in the decision as to whether we would take a program of "The Defenders" which happened to deal with abortion, which I did not feel was treated properly and I recommended, and my recommendation was accepted, that we not carry the program in Boston" (tr. 17037). He also remembered "being right in the middle of all the discussions regarding the presentation of a program called Biography of a Bookie Joint which had some national publicity" (tr. 17037). He has had no radio or television experience except with the WHDH stations. Mr. Akerson does not profess a familiarity with the details of the NAB code, nor with some of the details of WHDH's operation.

25. Mr. Akerson is a former chairman of the board of Newspaper Color Advertising, Inc., and was a leader in the formation of Newspaper I and served on its board of directors. He has worked with the United Fund, the Combined Jewish Appeal, the Boston Better Business Bureau, the Harvard Business School Association, and Brandeis University. He is a director of the Better Business Bureau of Metropolitan Boston, Inc., and is a former member of the board of governors of the Harvard Business School. Charles River asserts that there is no evidence of record whether in the past 5 years Mr. Akerson has had a 25 percent or greater ownership interest in or official connection with any business other than the Herald-Traveler and WHDH. Apart, however, from WHDH's explanation in its step III that form 301 calls for no information about nonownership and that it had no burden here, see the hearing examiner's comment in par. 58 below. It should be understood that wherever a similar statement is made in these findings it is the assertion of Charles River, and that its significance is subject to these remarks.

26. William B. McGrath, executive vice president, has been with WHDH since 1946, when on the purchase of the AM station by the Herald-Traveler, he joined WHDH–Radio as managing director. On December 30, 1953, he was named vice president and managing director of WHDH, Inc. and elected to its board of directors. He is a member of the board of directors of The Boston Herald-Traveler Corp., a position to which he was elected on December 30, 1963. He owns 5,550 shares of Herald-Traveler stock.

27. Mr. McGrath was born in Brooklyn, N.Y. He received a B.A. degree in liberal arts from Syracuse University. He has been active in broadcasting since his undergraduate days at Syracuse. He was an announcer at WSYR and WFBL, Syracuse; WNAC, Boston; and KYW, Philadelphia. In 1936 he became production manager at WNEW, New York City, and later was program manager and sales promotion manager of that station.

28. Mr. McGrath was the first president of the Radio Executives' Club of New England. He has been a director of the NARTB and the Broadcast Advertising Bureau. As vice president and managing director of WHDH, Inc., Mr. McGrath was responsible for the preparation and planning of WHDH–TV, and has managed its operations since it went on the air on November 27, 1957.

29. Since 1946 Mr. McGrath has worked with Boston's United Fund; he was radio chairman in 1950. He is on the advisory committee of Carney Hospital. He has served on various committees organized by the mayors of Boston; on the Massachusetts State Broadcasters' Committee; and on the board of directors of the Boston Advertising Club. He lives in Saugus, Mass., near Boston. The record is silent whether in the past 5 years McGrath has had a 25 percent or greater ownership interest or official connection with any business other than the Herald-Traveler and WHDH.

30. Roger P. Talmadge, treasurer of WHDH, Inc., has been with the corporation since 1948. He was elected treasurer and to membership of the board of directors of WHDH, Inc. on March 16, 1948, when he was also elected treasurer of the Boston Herald-Traveler Corp. He was elected to the Herald-Traveler board of directors on December 20, 1963, and although he resigned December 18, 1964, he participates ex officio but does not vote at directors' meetings. He owns 2,679 shares of Herald-Traveler stock.

31. Mr. Talmadge was born in Springfield, Mass. in 1913. He has lived in the Boston area for 28 years. His home is in Wellesley Hills, Mass. He graduated from Wesleyan University in 1935, and from the Harvard Business School in 1937 with the degree of M.B.A. He majored there in financial and investment management.

32. Mr. Talmadge joined the U.S. Naval Reserve in 1942 as an ensign and served until 1946, when he was released from active duty as a lieutenant. Following his discharge he returned to the Old Colony Trust Co., Boston, which he had left to join the Navy. He was assistant investment officer of Old Colony until January 1948, when he joined the Herald-Traveler as assistant treasurer.

33. Mr. Talmadge has been active in Red Cross work, serving as Wellesley area chairman in 1952. He is a Deacon of the Wellesley Hills Congregational Church, a board member of the Boston YMCA, the Wellesley Friendly Aid Association, and the Wellesley Boosters. He is a trustee of the Newton-Wellesley Hospital and the Wellesley Scholarship Foundation. He has occupied many executive positions with the Harvard Business School Club of Boston; he was the club's president from 1953 to 1954. He has been on the steering committee, the cost study committee, and a director of the Institute of Newspaper Comptrollers & Finance Officers. He is a member of the Treasurers' Club of Boston. The record does not disclose whether in the past 5 years Mr. Talmadge has had a 25 percent or greater ownership interest or official connection with any business other than the Herald-Traveler and WHDH.

34. Alexander M. Tanger was elected senior vice president of WHDH, Inc. on August 17, 1964. Before that he was vice president and sales director, a position to which he had been elected in Septem-

ber 1957. He has been with WHDH, Inc. since 1946, when he joined the company as an account executive. He was elected to WHDH, Inc.'s board of directors in March 1961. He owns 4,619 shares of Herald-Traveler stock.

35. Mr. Tanger was born in New York City in 1920. He attended Brooklyn College. His broadcasting background goes back before World War II, when he was a radio announcer with WLIB, WEVD, and WBNX, New York City. He was chief announcer at WFPG, Atlantic City, N.J.

36. Mr. Tanger enlisted in the U.S. Army as a private in 1941 and was honorably discharged in 1946 as captain, anti-aircraft artillery.

37. Mr. Tanger has been cochairman-advertising, for the United Jewish Appeal; and chairman of the radio division of the Salvation Army Fund campaign. He is a member of the board of directors of WTBS Foundation, Massachusetts Institute of Technology; a member of the board of directors of the Commercial Bank and Trust Co.; a member of the advisory board, Catholic Guild for All the Blind; and chairman, Temple Ohabei Shalom Combined Campaign for American Reform Judaism. He lives in Newton Centre, Mass., near Boston.

38. Robert B. Cheyne has been vice president and director of station relations of WHDH, Inc. since August 1964. He was formerly director of station promotion, a position he had held since he joined WHDH, Inc. in December 1957. He has an option on 1,000 shares of Herald-Traveler stock.

39. Mr. Cheyne was born in Cambridge, Mass., in 1922. He lives in Stoneham, Mass., near Boston. He attended Northeastern University, Boston. In May 1942 he enlisted as a U.S. Navy Aviation Cadet and was a Navy pilot on active duty until his discharge as a lieutenant in 1945. Following his military service, he was New England area salesman for Columbia Records, and became sales manager of the Columbia Record Division of Allied Appliance Co., Boston. He was later named vice president in charge of sales for all the company's divisions, including Motorola radio and television. In this position he was active in the introduction of color television receivers to the New England market.

40. Mr. Cheyne is a former member of the board of directors of the Broadcast Promotion Association. He was on President Eisenhower's Committee for Highway Safety. He was Massachusetts State Publicity Chairman for the Cerebral Palsy Campaign, and has served in advisory publicity roles with the united fund, the Massachusetts Safety Council, the Junior Advertising Club of Boston, and other groups. He is a member of the Broadcasting Executives Club of New England; a member of the board of directors and publicity chairman of the Greater Boston Fire Council; and is Bear Hill Club chairman of the Francis Ouimet Caddie Scholarship Fund.

41. John M. Day has been vice president and director of news and public affairs since August 17, 1964. He has been with WHDH, Inc. since he became a WHDH radio newscaster in 1952. In 1947 he was named news editor of WHDH radio; in 1956 program manager of WHDH radio; and in November 1957, director of WHDH–TV public affairs. He has an option on 1,000 shares of Herald-Traveler stock.

42. Mr. Day was born in Watertown, Mass., in 1920. He graduated from Boston University in 1942 with a degree of Bachelor of Journalism. He lives at Needham, Mass., near Boston. He joined the U.S. Army Air Force in June 1942, and served for 3 years as an air traffic control officer. He was discharged as a major from the Air Force Reserve in 1961.

43. Except for the 3 years he was active in the Air Force, Mr. Day has been a WHDH radio and television news broadcasting personality since 1942. Boston University Chapter, Alpha Epsilon Rho, awarded him its annual citation in 1958 for "outstanding contributions to the industry." He has been a guest lecturer at Boston University and was twice named "Newscaster of the Year" by the Cambridge School of Radio and Television Broadcasting. He has been president of the Boston Local, American Federation of Television and Radio Artists; is a member of the board of directors of the Metropolitan Boston Chapter, American Red Cross; is district chairman, Dorchester District, Boy Scouts of America; is a town meeting member, Needham; and has been radio-TV chairman for New England of the Radio Free Europe Fund and the Massachusetts Heart Association. He is a member of the Broadcasting Executives Club of New England, of the New England Professional Chapter of Sigma Delta Chi, and of the Needham Exchange Club.

44. Charles A. Hart, assistant treasurer, has been with WHDH, Inc. since 1954. He has an option on 350 shares of Herald-Traveler stock. Mr. Hart was born in Brookline, Mass., in 1926. He lives in Melrose, Mass., near Boston. In 1950 he graduated from Boston College with a degree of Bachelor of Science in Business Administration. He attended Bentley College, Boston, in 1953, and the Syracuse University Broadcast Responsibility Seminar in 1960. From 1950 through 1954 he was with the accounting firm of Lybrand, Ross Bros. & Montgomery. In 1955 he became a Massachusetts CPA. He is a member of the American Institute of Certified Public Accountants; National Association of Accountants; and American Accounting Association. He is a charter member of the Institute of Broadcasting Financial Management, and was on its advisory council, 1963–65; on its board of directors, 1961–63; and secretary-treasurer, 1962–63. In 1963 he was elected to the board of directors, Industrial Credit Union, Boston.

45. The Boston Herald-Traveler Corp., 100 percent stock owner of applicant WHDH, Inc., publishes the Boston Herald, a morning daily newspaper; Boston Traveler, an afternoon daily; and Boston Sunday Herald.

46. The officers of Herald-Traveler are:

George E. Akerson—President.
Harold Clancy—First Vice President.
Roger P. Talmadge—Treasurer.
Leon B. Ranger, Jr.—Assistant Treasurer.
James Garfield—Clerk.

The board of directors at the time of the hearing were George E. Akerson, George R. Brown, John M. Hall, Edward B. Hanify, William B. McGrath, Harold Clancy, and Kenelm W. Winslow. As already noted, Roger P. Talmadge had been elected to the Herald-

Traveler Board on December 20, 1963, and though he resigned on December 18, 1964, he participates ex officio but does not vote at directors' meetings. Mr. Clancy succeeded him. Mr. Hanify resigned as a director effective September 17, 1965, and was succeeded on that date by Richard Chapman. As of April 1, 1965, the stock holdings of its officers and directors in the Herald-Traveler totaled 33,358 shares, or 6.2 percent.

47. Of the present officers and directors of the Herald-Traveler, only Messrs. Akerson, McGrath, and Talmadge have any detailed familiarity with the WHDH–TV renewal application, or are personally active in the operation of WHDH–TV, WHDH, or WHDH–FM. Applicant contemplates no change of practice or policy in this respect. Matters involving WHDH–TV are brought before the Herald-Traveler Board of Directors in the form of reports on subjects like the station's progress, top personnel changes, earnings and business outlook, substantial capital outlays, and the current status of this case. While Mr. Choate was president the only written report of broadcast operation he gave the board dealt with finances, and as president Mr. Akerson has followed the same practice. Mr. Brown and Mr. Talmadge could recall no discussion at Herald-Traveler Board meetings of the station's policies, practices, programing, budget, or advertising rates. Mr. Brown testified that the board felt that it had delegated to Mr. Choate as president the responsibility of "manag[ing] and carry[ing] on the day-to-day operations of the" station (tr. 13849); and that he had full authority to take any action except one entailing capital outlays over $100,000, which he had to submit to the board for approval. These powers of Mr. Choate have now devolved upon Mr. Akerson. During Mr. Choate's last illness Mr. Akerson performed his duties without direction from the board. The Herald-Traveler Board has never given any instructions on the voting of its WHDH stock and has never discussed who should be elected to the WHDH Board. The original decision to affiliate with the ABC television network rather than operate independently, and the later decision to affiliate with CBS, were not submitted to the Herald-Traveler Board for prior approval. Mr. Brown testified that applications for license renewal are called to the board's attention for its information, but he could not recall that they are explained to or approved by it. The WHDH exhibits in this case were placed on a table in the directors' room at the Herald-Traveler at one time to give the directors an idea of the work involved in their preparation, but Mr. Hanify testified that they were not discussed or formally approved by the board. (WHDH submits in its Step III that these details are unnecessary in the findings, as its own proposed findings "made it clear that none of the directors of the Herald-Traveler, with the exception of Akerson, Talmadge and McGrath, has any detailed familiarity with the WHDH–TV renewal application, nor is personally active in the operation of WHDH–TV, WHDH, or WHDH–FM. The officers and directors of WHDH–TV, Inc., are concerned with handling the broadcast facilities and Akerson, McGrath and Talmadge provide the only necessary link with the Herald-Traveler Board * * * [WHDH cites footnote 6 at 22 FCC 767, 774, where in the original

comparative decision the Commission said, in accepting WHDH's not offering in its direct case biographies of Herald-Traveler directors with the exception of Mr. Choate: "The reasonable explanation, if one were required, would seem to be that furnished by WHDH: The principals of the Herald-Traveler were unfamiliar with the proposals made in the proceeding." Also, says WHDH, it is "misleading" to write of the lack of instructions by the Herald-Traveler Board on the voting of its WHDH stock because, as] "the Herald-Traveler Board knew who would be elected directors of WHDH—there was no need for formal instruction and no occasion for discussion.")

48. There follow sketches of Herald-Traveler officers and directors who are not also officers and directors of WHDH, Inc.

49. George R. Brown was born in 1898 in El Paso, Tex. He attended Middlesex School, Concord, Mass. from 1910 to 1916. He served in the U.S. Marine Corps in 1918. In 1920 he received an A.B. degree from Harvard, and an LL.B. from Harvard in 1923. Mr. Brown went with the United Shoe Machinery Corp. in 1923 and became its assistant general manager in 1934. He was elected a united director in 1935 and vice president in 1937. In 1946 he was appointed to United's executive committee, and was elected its president in 1949 and chairman of its board in 1961. Besides being a Herald-Traveler director, Mr. Brown is a director of the New England Telephone & Telegraph Co., and the Old Colony Trust Co., and is an honorary director of the First National Bank of Boston. In the past 5 years he has been, but is no longer, a director of the United States Smelting and Refining Co. He is a director of the United Fund of Greater Boston, and was chairman of its Pace-setter Division in 1963 and chairman of the Large Firms Department in 1964. He is a trustee of the New England Conservatory of Music, Northeastern University, and the U.S. Council, International Chamber of Commerce. He is a member of the board of overseers of the Boys' Clubs of Boston. Mr. Brown lives in Brookline, which adjoins Boston.

50. When WHDH exchanged its affirmative written case Mr. Brown owned 7,866 shares of Herald-Traveler stock. Afterwards he deposited all but 100 shares of this stock in a trust with Old Colony Trust Co. which provides that he "shall have voting power and investment responsibility regarding the securities of the Boston Herald-Traveler Corp." in the trust. The nominee of the voting trust is Clem & Co. Old Colony is also trustee in a trust for Helen Brown, Mr. Brown's wife. Mrs. Brown's Trust has 2,039 shares of Herald-Traveler stock; Mr. Brown has the exclusive power to vote these shares. There is no evidence in the record as to the ownership interest or official connection with any other broadcast facility on the part of officers, directors, and stockholders of Old Colony, and none as to an ownership interest by Old Colony. The record does not show whether Mr. Brown in the past 5 years has had a 25 percent or greater ownership interest in any business.

51. John Manning Hall was born in Boston in 1910. He received a B.A. degree cum laude from Yale in 1932 and an LL.B. from the Harvard Law School in 1935. He was admitted to the Massachusetts Bar in 1936. In 1935 he went with the Boston law firm of Choate, Hall &

Stewart, and became a partner in 1947. Mr. Hall is a member of the Federal Bar and admitted to practice in the U.S. Court of Appeals and the Supreme Court. He is a member of the Boston, Norfolk County, Mass., and American Bar Associations, a member of the Committee on the Sherman Act of the Antitrust Section of the American Bar Association, and a member of the Committee on Legislation of the Boston Bar Association. He lives in Brookline. He owns 2,158 shares of Herald-Traveler stock. The record is silent whether Mr. Hall, in the past 5 years, has had a 25 percent or greater ownership interest in any business.

52. Mr. Hall is a director of the Big Brother Association of Boston; trustee of the Massachusetts Foundation; trustee and treasurer, Emanuel Church, Manchester, Mass.; trustee, St. Mark's School, Southboro, Mass. (where he had been a student); chairman, Brookline Building Commission; corporation member, Children's Medical Center, Peter Bent Brigham Hospital; president, Institution for Savings, and Suffolk-Franklin Savings Bank; town meeting member, Brookline; formerly president, Massachusetts Foundation; and president and trustee, Dexter School, Brookline. The record shows that Mr. Hall became a director of Electronics Corporation of America on December 1, 1964, a date after the submission of the WHDH affirmative case (tr. 15338); that he has been a director of an insurance concern named Hogham-Neilson, Woodridge & Reid, which he believed to be defunct and in which he had not had an active role for several years (tr. 15338); that through oversight he failed to list that he is a corporation member of the Brookline Savings Bank, a nonprofit mutual savings bank (tr. 15344); that he has been a director of the East Coast Aviation Corp., which was defunct before submission of the WHDH affirmative case (tr. 15342); and that he is clerk of Stacey and Vasallo Fruit Co., Inc., a small wholesale fruit business, for which he keeps the books (tr. 15343).

53. Edward Benno Hanify (resigned September 17, 1965 and succeeded by Richard Chapman—see par. 46, above) was born in Fall River, Mass., in 1912. He graduated summa cum laude from Holy Cross College in 1933, and from the Harvard Law School in 1936. He is a practicing attorney and a member of the law firm of Ropes & Gray, Boston. Mr. Hanify is a director of the American Telephone & Telegraph Co.; John Hancock Mutual Life Insurance Co., State Street Bank and Trust Co.; and Boston Edison Co. He is a trustee of the Provident Institution for Savings in Boston, and was chairman of the 1950 Greater Boston Community Fund Campaign. He was president, Board of Managers of Boston Dispensary. He has received honorary degrees from Holy Cross, Tufts, Suffolk University, Bradford Durfee College of Technology, and Lowell Technological Institute. Mr. Hanify lives in Belmont, Mass., near Boston. He owns 202 shares of Herald-Traveler stock. There is no record information whether Mr. Hanify, in the past 5 years, has had a 25 percent or greater ownership interest in any business.

54. Kenelm Warren Winslow was born in Beverly, Mass., in 1916. He lives in Brookline. He attended Worcester Polytechnic Institute

and Black Mountain (N.C.) College. Mr. Winslow joined B. B. Chemical Co. of Cambridge, Mass. in 1940, and filled various positions with the company, in the contact department, sales department, as laboratory director, and as administrative assistant. He was a director of B. B. Chemical Co. from 1952 until it became a division of United Shoe Machinery Corp. in 1962. Mr. Winslow owns 4,937 shares of Herald-Traveler stock. He was not sure whether he acquired his stock by purchase or by inheritance (bequest). There is no evidence in the record whether, in the past 5 years, Mr. Winslow has had a 25 percent or greater ownership interest in any business; whether he has any official connection with any business other than the Herald-Traveler; or in the past 5 years with any business other than B. B. Chemical Co.

55. Harold Clancy was born in 1920 in Quincy, Mass. He has been a full-time employee of the Herald-Traveler since June 1949, except during a period in 1962 and 1963 when he was a part-time Herald-Traveler consultant and was engaged in private law practice in Boston. He owns 614 shares of Herald-Traveler stock. Official notice may be taken of a WHDH Form 323, reporting that at some time after the original closing of the record and before December 31, 1965, Mr. Clancy exercised an option for the purchase of 5,000 Herald-Traveler shares (form 323, filed January 18, 1966). The same form reported his percentage of ownership as 0.91 percent, an obvious error, as the addition of 5,000 to his previous 614 shares would bring his percentage to about 1.02 percent. Mr. Clancy does not own a 25 percent or greater interest in any business; and has not for the past 5 years, apart from his law practice, had any official business connection except as a director, since 1961, of General Aniline and Film Corp.

56. Leon B. Ranger, Jr. was born in Boston in 1923. From November 1951 through August 1960, he was employed by Lybrand, Ross Bros. & Montgomery in its Boston office. The Herald-Traveler employed him on September 1, 1960. He owns no Herald-Traveler stock. In the past 5 years he has not had a 25 percent or greater financial interest in any business, or an official connection with any business other than the Herald-Traveler.

57. James Garfield, clerk, was born in 1889 in Cleveland, Ohio. For more than 5 years he has been a member of the law firm of Choate, Hall & Stewart. He owns 10 shares of Herald-Traveler stock. Mr. Garfield does not own a 25 percent or greater interest in any business, and has no official business connection except with the Herald-Traveler. Whether this would also be true for the past 5 years does not appear of record.

58. None of the Herald-Traveler officers or directors has a 1 percent or other reportable interest in any broadcast licensee except as the Herald-Traveler is 100 percent owner of applicant's stock. In its step II proposed findings Charles River contends that the record does not support this finding. It cites WHDH exhibit 7A, page 3, which reads:

> As is true in the case of the other officers and directors of the Herald-Traveler Corp., neither Mr. Clancy, Mr. Ranger, nor Mr. Garfield has a 1 percent interest in any other broadcast licensee.

Apparently because this general statement is in an exhibit relating only to Messrs. Clancy, Ranger, and Garfield, while in the particular biographical exhibits (IA and IB) on Messrs. Akerson, Talmadge, McGrath, Brown, Hall, Hanify, and Winslow, there is no information about their broadcast ownerships, Charles River would deny to the statement any evidential validity except as to Messrs. Clancy, Ranger, and Garfield. But Charles River had full opportunity at the hearing to explore and if possible demolish it, and has chosen instead to wait until now to argue against it. Its tactic must fail. A similar observation may be made regarding the failure of the record to show whether principals had other business interests in the past 5 years. While the state of the record has been noted, it should also be noted that Charles River and the other parties had the opportunity at the hearing to obtain the information. *Johnston Broadcasting Co.* v. *FCC*, 4 R.R. 2138.

59. In every year, 1945–65, the Herald-Traveler management has proposed that at the annual meeting the stockholders fix the number of directors at seven and that the incumbent directors be reelected for the next year. The stockholders have followed these annual proposals and have annually elected the seven directors of the management slate. Vacancies in the board of directors because of death or resignation have in every case been filled by the board.

60. The Herald-Traveler directors from September 21, 1945 to July 16, 1965, have been:

	Elected by board to fill vacancy	Resigned or Died
G. R. Brown	(*)	
Channing H. Cox	(*)	Resigned June 12, 1959.
James Garfield	(*)	Resigned Mar. 8, 1946.
John L. Hall	(*)	Resigned Mar. 15, 1954.
H. A. Hildreth	(*)	Resigned, Sept. 11, 1953.
Bulkeley F. Winslow	(*)	Died June 8, 1952.
Sidney W. Winslow, Jr.	(*)	Died July 14, 1963.
Robert B. Choate	Mar. 8, 1946	Died Dec. 21, 1963.
Kenelm W. Winslow	Feb. 13, 1953	
James Garfield	Feb. 12, 1954	Resigned Apr. 9, 1954.
John M. Hall	Mar. 15, 1954	
Carl J. Gilbert	Apr. 9, 1954	Resigned Feb. 17, 1961.
Edward B. Hanify	June 12, 1959	
George E. Akerson	Feb. 17, 1961	
Roger P. Talmadge	Dec. 20, 1963	Resigned Dec. 18, 1964.
William B. McGrath	Dec. 30, 1963	
Harold Clancy	Dec. 18, 1964	

The asterisk indicates membership on the board on September 21, 1945, when the application for transfer of control of WHDH (File No. B1–TC–463) was filed. Again it should be noted that Mr. Talmadge, as treasurer, participates ex officio but does not vote at directors' meetings. The officers of the Herald-Traveler during the period September 21, 1945 to July 16, 1965 are:

	Elected	Resigned, died, or retired
Chairman of the board:		
S. W. Winslow	Mar. 15, 1960	Died July 14, 1963.
Robert B. Choate	Oct. 18, 1963	Died Dec. 21, 1964.
President:		
S. W. Winslow	(*)	Resigned Mar. 15, 1960.
Robert B. Choate		Resigned Oct. 18, 1963.
George E. Akerson		
Vice president:		
John L. Hall	(*)	Resigned Mar. 16, 1954.
Robert B. Choate	Mar. 16, 1954	Mar. 15, 1967.
Harold E. Clancy	Dec. 20, 1963	
Treasurer:		
H. C. Wenderoth	(*)	Retired Mar. 22, 1948.
Roger Talmadge	Mar. 22, 1948	
Assistant treasurer:		
Francis A. Wood	(*)	Retired Apr. 30, 1961.
Lee Ranger	Mar. 21, 1961	
Clerk: James Garfield	(*)	

61. *Herald-Traveler Shareholders owning 3 percent or more of stock.* The amounts shown in this section are those reported on forms 323 for the persons named as of July 16, 1965, when the present hearing record was first closed.

62. *The "Garfinkle Voting Trust."* Herbert D. Adams, John N. Fulham, and Abram Sachar are voting trustees under a voting trust agreement dated October 18, 1963. The agreement was filed as an attachment to WHDH form 323, dated October 22, 1963. There are 83,303 shares in the voting trust.

63. Henry Garfinkle is president of American News Co. He lives in New York City, but has a vacation home in Marblehead, Mass. American News was formerly in the periodical distribution business but has now dropped that division. American News is listed on the New York Stock Exchange and has paid a dividend for 100 years. Mr. Garfinkle owns about 12½ percent of its stock. American News operates about 1,700 newsstands throughout the country, and has interests in restaurants, vending machines, book distribution, and match production. Union News, an American News subsidiary, is in the retail newsstand business. He is also sole stockholder of Greater Boston Distributors, which distributes newspapers, books, and magazines in the Greater Boston area. Mr. Garfinkle's various companies have some 12,700 employees. Solomon Levine, Mr. Garfinkle's brother-in-law, who manages Mr. Garfinkle's investments, is president of Greater Boston Distributors. Mr. Garfinkle's family also controls Manhattan News, which distributes magazines in Manhattan, and Garfield News, which is in the newsstand business there.

64. Mr. Garfinkle knows and thinks highly of Mr. Akerson. Around the middle of 1961 Mr. Garfinkle had bought 2,000 shares of Herald-Traveler stock. Mr. Garfinkle told Mr. Levine about the purchase. It was decided that Greater Boston Distributors should buy Herald-Traveler stock, and over the next year Distributors accumulated 38,000 shares in several sizable blocks, through several brokers. This represented an investment of about $700,000. In the meantime Mr. Garfinkle had bought an additional 2,000 shares, making his personal investment (apart from Distributors') 4,000 shares. Mr. Garfinkle bought no more Herald-Traveler stock after Distributors had reached 38,000 shares, but Distributors continued to increase its holdings.

65. The Garfinkle and Garfinkle-associated stock ownership became publicly known. Mr. Garfinkle testified that he thought of a voting trust, in which the stock would be deposited "to get the harassment away from me with the newspaper stories that 'Garfinkle is taking over the control'" (tr. 12602); and "when all the pressure of the newspaper stories and everybody was bothering me about the stock and the stories that appeared in the paper * * *. It was annoying. I thought the best thing to do would be to put it in and lock it up, pick the three top people [as trustees] and get away. That is the way it all happened. I took the 4,000 shares I had and threw it in with the rest [Distributors' Herald-Traveler shares]" (tr. 12709–10). Mr. Levine testified that in September or October 1963, "Mr. Garfinkle and I had been discussing a means whereby he would stop being harassed by newspapers and people in his connection with American News and I, myself, would also stop being harassed by individuals, annoyed" (tr. 12972). Mr. Garfinkle directed Mr. Levine to have Thomas Joyce (who happens to be local counsel for the Herald-Traveler) draw up the voting trust. Mr. Garfinkle thought it desirable to have a balanced ticket, and shortly after his direction to Mr. Levine he suggested as prospective trustees Dr. Herbert D. Adams, his personal physician and surgeon, a Protestant; and Dr. Abram Sachar, a Jew, president of Brandeis University; and he told Mr. Levine to "ask Tom Joyce" to "get a prominent Catholic to fill it out" (tr. 13077). It appears, however, that John N. Fulham, a well-known Boston businessman, was suggested as a possible Trustee by Leo F. Daley, a director in one of Mr. Garfinkle's corporations; Mr. Akerson personally called Mr. Fulham. A list of eight to ten possible trustees had been given the Herald-Traveler Board to see if there were any objections or possible conflicts of interest. Mr. Joyce told the board of the background of each of the potential trustees. All three—Dr. Adams, Dr. Sachar, and Mr. Fulham—accepted the trusteeships. Mr. Akerson issued a statement in which he said that "The company is gratified at this expression of confidence and pleased that three such eminent men have been elected trustees" (Charles River, exhibit 42).

66. The voting trust agreement, prepared by Mr. Joyce, was signed by Mr. Garfinkle for himself and by George Lipson, vice president and general manager for Greater Boston Distributors; and by the three trustees. It is dated October 18, 1963. Its term is 5 years from that date. It "shall then terminate" (WHDH exhibit 7B). Although the trust agreement provides that any Herald-Traveler stockholder may become a party to the trust, the only stockholders who have deposited Herald-Traveler shares in the Trust are Mr. Garfinkle and Greater Boston Distributors. Mr. Garfinkle's 4,000 shares were made subject to the Trust, as were an original 58,003 shares by Greater Boston Distributors. The 83,303 now on the books in the names of the trustees (the largest block of Herald-Traveler stock) include the original transfer of some 62,000 shares, a stock dividend declared since then, and additional transfers by Greater Boston Distributors. The trust corpus represents an investment of about $3 million. All Herald-Traveler stock acquired by Mr. Garfinkle or Greater Boston Distributors during the trust term shall be assigned to the trustees. Under the trust agreement the "trustees shall have and are given full power and

authority to represent the holder or holders of the trust certificates [which the trustees are to issue to the settlors and are assignable] and the stock transferred to them * * * and to vote [the] stock as they or a majority of them may determine to be in the best interests of the corporation at all meetings of the stockholders of [the] corporation, in the election of directors and upon any and all matters which may be brought before such meetings, as fully as any stockholder might do if personally present." There is no power in the trustees to sell or exchange the Herald-Traveler shares which are the corpus of the trust, but they "shall hold the * * * shares of stock transferred to them for the benefit of the subscribers," and on "termination of the trust, the trustees shall upon surrender of the trust certificates by the holders thereof, assign and transfer to them the number of shares of stock thereby represented."

67. Mr. Levine testified on the choice of the 5-year Trust term (tr. 12979):

> Well, I felt that 5 years would be an adequate period. After 5 years I wanted to review the investment, [the changed] economic conditions of the world, investment which is good in 1965 may not be good in 1970.
>
> I felt also that if you make an investment for 5 years that it is a long enough period of time that people won't bother us because you can't ask a man to do you a favor that he can't do anything for 5 years. Therefore, that would stop all this nonsense and that at the same time it would be safeguarded for an investor but I would not be signing away the rights forever.
>
> • • • • • • •
>
> Plus in 5 years Mr. Garfinkle's children, who are, of course, very young would be getting older and that at the end of 5 years they would reach their majority.

Mr. Garfinkle agreed that on the Trust's expiration the stock would go back to him "and to [his] family" (tr. 12,603). He testified that the only instructions he had given Dr. Adams and Dr. Sachar (he had never met Mr. Fulham) were to "look after [his] children" if he were not alive.

68. The trustees are unpaid. There has been only one "formal" meeting of the trustees. It took place at Brandeis University on November 22, 1963, the day of President Kennedy's assassination, and was curtailed by that tragedy. Of the trustees only Dr. Adams and Dr. Sachar attended. (Mr. Fulham had agreed to come but had been held up at another meeting.) Mr. Garfinkle and Mr. Akerson also were present at this short meeting, when Mr. Garfinkle mentioned his concern about his children narrated in the preceding paragraph. There has been one other "informal" meeting of the trustees, shortly before a March Herald-Traveler stockholders' meeting, when all trustees were present.

69. At Herald-Traveler stockholders' meetings the trustees have voted their shares for management. One controversial situation was the attempt by Midwestern stockholders (see below) to increase the number of directors from seven to nine, and to have two of their number elected to the Board. Management opposed this proposition, which was defeated. The trustees had not personally entered into this controversy, and had received no report about it in advance, but after a general discussion of newspaper and television matters with Mr. Akerson and other management representatives they had given their

proxy to Mr. Joyce, with instructions to vote for management. Mr. Fulham testified, however, that he had known of the proposed increase in the board before the proxy statement was signed; he felt that it was "well known in Boston what the position of the management" was on the increase (tr. 14129). The trustees have not themselves attended stockholders' meetings.

70. The trustees did not know of any books or minutes of the trust, nor if there is any trust attorney. They did not know of the whereabouts of the stock certificates which form the trust corpus. They have received no trust accounting and have paid out no trust expenses. It does not appear that Mr. Joyce has rendered a bill as yet for drawing up the trust instrument.

71. Brief descriptions of the three trustees follow in paragraphs 72–74.

72. Dr. Herbert D. Adams was born in 1904 at Ogden, Utah. He is president-treasurer and director of the famous Lahey Clinic, Boston, and is surgeon-in-chief of the Lahey Clinic and New England Baptist Hospital. He has been associated with the Lahey Clinic for the past 28 years. Dr. Adams does not have a 25 percent or greater interest or an official connection with any enterprise other than as here mentioned, nor does he own stock or have a reportable interest in any broadcast facility except through the trust.

73. John N. Fulham was born in 1917 at Winthrop, Mass., near Boston. During the past 5 years his principal occupations have been as executive, president, and director of Fulham Bros., Inc., Boston, whose main business is the wholesale marketing of fish; and as president and director of the Boston Fish Market Corp. before January 1, 1964, when be became vice president of that corporation. He has a 33⅓ percent interest in Boston Fish Market Corp. Fulham Bros., Inc. was merged into Gorton's of Gloucester and is now a division of Gorton's. Before the merger Mr. Fulham owned 43 percent of Fulham Bros., Inc. His interest in Gorton's is less than 25 percent. Mr. Fulham is a director and president of a Gorton's division. In the last 5 years he has also been engaged in the following other businesses, in none of which does he have a financial interest:

(*a*) Director, Elliott Creamery. Ice cream warehousing and frozen foods delivery.

(*b*) Director, La Touraine Coffee Co. Coffee and other groceries.

(*c*) Director, J. F. White Contracting Co. A medium-sized contracting firm which constructs roads, bridges, and buildings.

Mr. Fulham has no financial interest in or official connection with any broadcast facility. (In October 1965, Mr. Fulham resigned as trustee and was replaced by Leo F. Daley, appointed by the remaining trustees [WHDH form 323, dated December 15, 1965].)

74. Dr. Abram Sachar was born in 1899 in New York City. He has been president of Brandeis University since 1948. He has no other business or professional connection, and no financial interest or official position with any broadcast facility.

75. In 1961 the Federal Trade Commission said that the action of American News Co. and its subsidiary Union, the country's largest retail newsstand operator, in demanding display promotion allowances

or rebates from magazine publishers constituted "a classic example of the misuse of economic power possessed by large buyers." The FTC found that the companies had knowingly induced and received from their suppliers discriminatory payments as consideration for services or facilities furnished by the companies in connection with the sale of suppliers' goods. The Commission concluded that these payments were unlawful under sec. 2(d) of the Clayton Act, as amended, 15 USC, sec. 13(d), and held that inducement and receipt of these unlawful payments constituted an unfair method of competition which violated sec. 5 of the FTC Act, 15 USC, sec. 45. The FTC ordered American and Union to cease and desist from the practices. On appeal the United States Court of Appeals for the second circuit affirmed the FTC's decision. The court held that inducement and receipt of payments which violate sec. 2(d) are per se a violation of sec. 5, so that there could be no question of the "reasonableness" of the companies' activity (they contended they had to act as they did to combat the effect of illegal price fixing by the publishers). There was a vigorous dissent by Judge Moore, who felt that the companies were merely exercising their legal bargaining power in a competitive economy. *American News Company* v. *FTC*, 300 F. 2d 104.

76. In response to a direct inquiry, Mr. Garfinkle denied that Union News had ever raised or tried to raise the newsstand price of The New York Times to 15 cents, in New York City or elsewhere. He said that the publishers control the price and that any attempt by a distributor to raise the price without their consent would result in the publisher's cutting off the supply of papers. On January 19, 1960, Morris Strassman, vice president of Union News, wrote Amory H. Bradford, business manager of The New York Times, that effective February 15, 1960, Union News would increase the price of all weekday papers by 1 cent and the Sunday by 2 cents. Mr. Strassman wrote Mr. Bradford again on February 11, 1960, telling him that Union News would postpone the scheduled date for the general price increase from February 15 to March 1, 1960. Although the general price increase described in Mr. Strassman's letters was never put into effect, on April 9, 1960, Union News increased the price of the Times by 2 cents on weekdays and by 5 cents on Sundays at its newsstands beyond 50 miles from New York City. The Times discontinued deliveries to newsstands at which the price had been increased. Most of the Union News stands in the New York City and suburban area then placed the Times on the floor at the back of the stands, and although Union News continued to sell the Times it was not displayed with most other newspapers. This lasted until May 14, 1960. While the Times was not being displayed at Union News stands, its publisher distributed extra copies to other stands, put up posters, and on May 13, 1960, set up its own stands in Grand Central Terminal. Mr. Garfinkle was aware at the time of these activities of Union News. (*a*) The matter received considerable publicity in the New York press; (*b*) Mr. Garfinkle telephoned Ivan Veit, vice president of The New York Times, on May 13, 1960, to tell him that next day Union News would rescind its price increases and replace the Times on the stands.

77. Charles River and BBI earnestly contend that the New York Times matter casts a sinister light on Mr. Garfinkle's veracity (see step II, Charles River, p. 30, and BBI, p. 149). On this score the attempted impeachment was ineffective, as Mr. Garfinkle's attention had not been directed, in his examination-in-chief, to any prior contradictory statements by himself or by anyone in his organization. (See *Wigmore, Evidence*, Sec. 1025, *et seq.*) This would have been a fair attempt to refresh his recollection. It cannot be found on this record that when he testified Mr. Garfinkle (who, in any event, was not WHDH's witness), had the New York Times matter in mind and consciously testified falsely regarding it. For whatever relation the transaction may have to the question of news media diversification, however, it has been included.

78. John Blair & Co., a Delaware corporation with its main office in New York City, owns 50,000 shares of Herald-Traveler stock. All the officers, directors, and stockholders of John Blair & Co. are citizens of the United States. The company is an advertising representative of radio and television stations, including those of applicant. The Blair representation contract with applicant "started November 24, 1957, and automatically renews itself from year to year" (tr. 13444). Blair has represented the radio stations since the Herald-Traveler began operating them in 1946. Blair & Co. receives as commissions over $500,000 a year from applicant. It does not own 1 percent or have any reportable interest in any other broadcast facility, though it has less-than-1-percent-interests in several broadcast properties. There is no evidence in the record whether the officers, directors, or stockholders of John Blair & Co. have any ownership interest in or official connection with any other broadcast facility; or whether Blair, in the past 5 years, has had a 25 percent or greater ownership interest in any other business. Nor does the record show whether the officers, directors, or stockholders of Blair, other than John Blair, have any ownership interest in the Herald-Traveler and through it of WHDH.

79. Mr. McGrath, of WHDH, telephoned Arthur H. McCoy, president of John Blair & Co., in early February 1964, to tell him that a block of 50,000 shares was available at $31 a share from the Winslow estate, of which Old Colony Trust Co. was the representative. This was the first time Mr. McCoy had heard that Herald-Traveler stock was being offered, though some time before John Blair (majority stockholder of John Blair & Co., who personally owns about 4,000 shares of Herald-Traveler stock) had asked Mr. McGrath to tell him if any could be bought. Mr. McCoy discussed the matter within his organization. Mr. McGrath and Mr. Akerson came down to New York to meet with Mr. McCoy, and Mr. Rose, Blair's controller. Later, before Blair bought the stock, Mr. McCoy and Mr. Rose also talked to Mr. Clancy and Mr. Talmadge. The "meeting ended on the basis that 50,000 shares would be available for us, at least to the point where it would make sense for me to contact John Blair in the Orient and see if he would authorize our pursuing this any further," Mr. McCoy testified (tr. 13434). After Mr. McGrath's telephone call to Mr. McCoy, and before Blair actually bought the stock in March 1964, Mr. McCoy learned that midwesterners were acquiring Herald-Traveler stock. When Blair

& Co. bought the 50,000 shares (about 10 percent of Herald-Traveler's issued stock) it was not asked whether it wanted to be represented on the Herald-Traveler board of directors, and it did not ask for such representation; in fact, testified Mr. McCoy, such a course would have been against Blair's policy. Blair's invariable practice is to "tie in with the management team of" any station it represents (tr. 13439). When it bought the 50,000 Herald-Traveler shares it intended to vote with management; there "was no question about it" (tr. 13439). Mr. McCoy thinks that the present WHDH management will "make progress" (tr. 13478). Mr. Rose had the Blair proxy to vote at the March 1964 meeting, where he supported management against the dissident stockholders' unsuccessful attempt to enlarge the board of directors. Mr. McCoy testified that John Blair & Co. is interested in buying additional big blocks of Herald-Traveler stock, but it has not tried to buy the stock over the counter from any broker, or got in touch with other large holders. Blair & Co. had been ready to buy as many as 75,000 shares when it bought its 50,000, but had been unable to do so apparently because Herman E. Muller (see below) had already bought 26,000 from the Winslow estate block. Blair bought its 50,000 shares from Old Colony for about 10 percent above the $31 price Mr. McGrath had spoken about (Mr. McGrath had merely quoted the price listed in the financial page over-the-counter lists). Mr. McCoy hoped that Blair's ownership of Herald-Traveler stock would help keep other reps from trying to compete for WHDH's business.

80. Herman E. Muller was born in 1899 in Jersey City, N.J., and was a resident of New York City. He owned 26,100 shares of Herald-Traveler stock, which he bought in February 1964. He and his wife died in an automobile accident in October 1965, but the account in this initial decision will proceed as if that tragic event had not occurred. During the past 5 years his principal occupation and business had been as senior partner in Milligan, Muller & Co., certified public accountants, New York City; and as senior partner in Muller, Bennett & Associates, management consultants, New York City. He was also chairman of the board of Autographic Business Forms, Inc.; a director of American Life Insurance Co. of New York and Surety Fire Co. of New York; trustee and chairman of the board of Ithaca College; treasurer and director of Doctors Hospital, New York City; and an official of other educational, cultural, and professional organizations. Though he has large investments in several companies, he has no financial or other reportable interest in any commercial broadcast facility other than through the Herald-Traveler.

81. Through Victor Manno, of New York City, a good friend for many years, who is a newspaper and broadcast station broker, Mr. Muller learned that a large block of Herald-Traveler stock was for sale. He had asked Mr. Manno to keep his eyes open and to tell him of any opportunity to invest in a newspaper, a business he "thought * * * in the years to come was going to be a profitable venture" (tr. 13362). Mr. Manno told Mr. Muller that the "newspaper business was not doing too well but under Akerson's management this was going to improve greatly" (tr. 13364). Mr. Muller met Mr. Akerson and Mr. Clancy in Mr. Manno's office in New York City in January

1964. Mr. Manno had arranged the meeting. Mr. Akerson confirmed the availability of a block of 76,000 shares. In February 1964, before his stock purchase, Mr. Muller went to Boston and met the members of the Herald-Traveler management—Mr. McGrath and Mr. Talmadge—as well as Mr. Clancy and Mr. Akerson. The two meetings convinced him "that here was a good management" (tr. 13367). Negotiations with Old Colony Trust Co., the estate representative which controlled the 76,000 shares for sale, were conducted through Mr. Clancy, who presented Mr. Muller's offer to Old Colony, and the law firm of Choate, Hall & Stewart (who did not represent Mr. Muller). Mr. Muller bought 26,000 shares of this block of 76,000 shares. Concurrently there was a purchase of 500 shares from a Baltimore seller; of these 500, Mr. Muller bought 100 in his own name, and put 400 (100 each) in the names of his daughter, two sons, and his wife. The total Muller family holdings is therefore 26,600. The record does not show whether Mr. Muller, in the past 5 years, had a 25 percent or greater ownership interest in any business other than his principal ones.

82. Mr. Muller "admire[d] the way [Mr. Akerson] is doing things." He felt that he "is an excellent manager and certainly [he] will vote for management as long as it is good" (tr. 13383). In his opinion, the Herald-Traveler management "command the loyalty and respect of their fellow employees" (tr. 13387). He testified to his satisfaction with the Herald-Traveler board of directors, though he knew only Mr. Akerson, Mr. McGrath and Mr. Hanify (tr. 13391–2). In principle he was a management adherent. He testified, "I will support management if they are any good. In this case, as I say, I think they are pretty good"; he did not, however, tell this to Mr. Akerson, but expressed his admiration of Mr. Akerson to Mr. Manno (tr. 13406). From information Mr. Manno had given him, Mr. Muller felt that Mr. Akerson "was a terrific improvement" over Mr. Choate (tr. 13408). Mr. Muller had no opportunity, however, to demonstrate his liking for management at the March 1964 meeting, where the contest with the dissidents over board enlargement took place, as the shares were not transferred to him in time to give him voting rights; and as he testified in December 1964, the record does not show how he voted at the 1965 stockholders' meeting.

83. Joseph F. Rosenfield is a merchant in Des Moines, Iowa, where he was born in 1904. He is a member of the bar but has retired from law practice. He owns 17,049 shares of Herald-Traveler stock. Mr. Rosenfield was told of the stock by George Lyon, a Minneapolis banker with whom he does business. After brief inquiry, "almost none at the time because I was not buying a large block" (it was 1,000 shares) (tr. 13208), he made his first purchase in 1959 or 1960. He bought the stock because he assumed the newspaper was profitable and because of the "romance" of a TV authorization (tr. 13208). Mr. Rosenfield thought that he was "a kind of guinea pig" for other Midwestern investors whom Mr. Lyon might interest in Herald-Traveler stock. Mr. Rosenfield bought blocks of Herald-Traveler stock at irregular intervals over several years, the purchases varying "with the price of the stock which had a habit of gyrating up and down

quite rapidly, particularly every time the Commission entered an order of some kind" (tr. 13209); and with the state of his finances and the availability of the stock. The prices he paid per share ranged from $26 to $35. His latest purchase before his testimony in December 1964, was in April or May 1964, after the March stockholders' meeting—the only Herald-Traveler annual stockholders' meeting which Mr. Rosenfield attended. He testified "that in a stock that I have this big an interest in, I should always be considering whether I am going to buy some more or sell some" (tr. 13220).

84. Mr. Rosenfield tried to buy some of the Winslow estate stock, but was unsuccessful (see below). He did, however, buy some of the stock of Mr. Choate's estate, either in his own name or in the name of the Meyer Rosenfield Charitable Trust, which he had established in memory of his father. All the Charitable Trust stock—2,000 to 3,000 shares—has since been given to Grinnell College, of which he is an alumnus and a trustee, and is not included in the 16,000 shares he owned at the time of his testimony. Ninety-five percent of the Herald-Traveler stock he bought was obtained through Mr. Lyon.

85. Before Old Colony received bids for the 76,000 shares (see above, paragraph 81), Edward B. Hanify, an attorney and Herald-Traveler director, had been retained by the Herald-Traveler as its attorney in connection with Old Colony's sale of Herald-Traveler stock. Mr. Hanify's opinion, which he communicated to Old Colony's counsel, Mr. McFarland, and to Sidney Winslow's widow and her counsel, was that in selling Herald-Traveler stock, Old Colony had a duty not only to get a reasonable price but also to consider the effect of the disposition on the corporation and its shareholders. Mr. Dempsey, WHDH's broadcast counsel, had advised Mr. Hanify that it was applicant's position before the Commission that the same pattern of control of the Herald-Traveler had existed for 18 years; and that a sale of the stock which would change the pattern would prejudice WHDH's chances in this case. Mr. Dempsey's partner, Mr. Koplovitz, later confirmed this advice in a letter to Mr. Hanify. Mr. Hanify was concerned that a sale of Herald-Traveler stock held by Old Colony to the Midwest group would create the risk of a contention that there had been a transfer of control.

86. After being advised of the factors Old Colony would consider in evaluating the bids, Blair and Mr. Muller had revised their bids. The revised bids were submitted to Old Colony on February 20, 1964. In addition to the Blair & Muller bids, Old Colony received a bid from Piper, Jaffray & Hopwood for Messrs. Rosenfield and Ruan. The Blair bid had specified that it did not own any Herald-Traveler stock and that it was not affiliated with any person, firm, or corporation owning more than 4,034 shares of Herald-Traveler stock. Mr. Muller's bid specified that he owned only 500 shares of Herald-Traveler stock and that he was not affiliated with any person, firm, or corporation owning Herald-Traveler stock. Piper, Jaffray's bid of $36 did not spell out the situation with regard to ownership of Herald-Traveler stock by the persons for whom the bid was submitted, but it said that it was submitted on behalf of fewer than 10 customers, and that these included Messrs. Rosenfield and Ruan. Old Colony ac-

cepted the bids of Blair and Mr. Muller for the 76,000 shares over the bid of Piper, Jaffray; the Blair and Muller bids were $34.625 a share and the Piper, Jaffray bid was limited to 40,000 shares, with a lower limit of 20,000, and the combined lower limit of Blair and Mr. Muller was 63,000 shares. The possibility, however, that all the bids might be accepted by dividing the shares between Blair-Muller at the lower price and Piper, Jaffray at the higher, was not discussed. Old Colony did not advise several interested parties that it had a bid for $36 a share before accepting the Blair and Muller bids.

87. WHDH does not deny that it was interested in seeing that large blocks of its stock were not bought by hostile factions. It writes (step III, p. B(6)(2)–1:

> If [Charles River is suggesting] that in some manner Old Colony Trust Co. was derelict in the discharge of its trustee obligation, that contention is out of place in this proceeding and could only properly be raised by the beneficiaries of the trusts involved. Old Colony's actions are not subject to collateral attack here. If its [Charles River's] purpose is to show that Mr. Akerson endeavored to see that the large block of stock which Old Colony intended to sell did not fall into the hands of persons who would be unfriendly to the policies of the corporation, or whose acquisition of the stock might be used in some way to bring about a change in the relationship between ownership and management of the company, which had been in existence for years before Herald-Traveler acquired WHDH, or to prevent the stock being sold in such manner as to depress the value of outstanding Herald-Traveler stock—the short answer is that he did and admitted he did have these objectives. There is nothing whatever improper about them.

88. Mr. Rosenfield told several friends that he was buying Herald-Traveler stock. Some of them also bought the stock, mostly through Mr. Lyon. Mr. Lyon told Mr. Rosenfield of other persons in the Midwest who were buying Herald-Traveler stock. Mr. Rosenfield made no general attempt to contact them, but some of the stockholders were friends and acquaintances with whom he had "a kind of general understanding" to keep them informed of developments (tr. 13323).

89. Mr. Rosenfield had been getting information from Mr. Lyon, who had gone to a couple of annual Herald-Traveler meetings, and had met some management people. He felt, however, that he should get more direct information. He discussed the possibility of a meeting with Mr. Choate with Mr. Lyon, Mr. Ruan (see below), and with perhaps some other Herald-Traveler stockholders. Mr. Lyon set up a meeting with Mr. Choate in Boston in September 1963. At this first meeting with Mr. Choate, Mr. Rosenfield, Mr. Lyon, and Mr. Ruan were conducted through the Herald-Traveler newspaper plant and the television studio. They then had lunch at a hotel with Mr. Choate. Mr. Rosenfield asked Mr. Choate for representation on the Herald-Traveler board of directors. Mr. Rosenfield "told Mr. Choate that in addition to Mr. Ruan and myself, * * * a lot of our friends had stock and that I was sure they would be quite happy to see a couple of us on the board" (tr. 13230). Mr. Choate's "answer was not quite no" (tr. 13230), but Mr. Rosenfield felt that he would be turned down; Mr. Choate said he would discuss it with the Herald-Traveler Board, but he remarked that "the chances were not good" (tr. 13230). At this meeting, Mr. Rosenfield spoke to Mr. Joyce, who was also present, about "inspecting the Herald-Traveler stockholders' list," but Mr. Joyce replied

"that there was a suit pending in the Supreme Court brought by another stockholder [Mr. Donaldson] and he would not be disposed to discuss giving us the list until this suit had been determined" (tr. 13231). Mr. Rosenfield had discussed the obtaining of the list with Mr. Ruan; he has, he testified, "discussed every facet of the Herald-Traveler situation with Mr. Ruan at some time or other" (tr. 13231). (Mr. Rosenfield and Mr. Ruan filed an action in the Massachusetts Superior Court to get the Herald-Traveler stockholders' list and received judgment in their favor some 30 to 60 days before Mr. Rosenfield testified here; and though the "Herald-Traveler indicated their intention to appeal * * * Mr. Akerson, with whom we [Mr. Rosenfield and Mr. Ruan] had breakfast yesterday, informed us that as long as everybody else seemed to have the list, he saw no reason why we should battle any further, and he was going to see to it that the case was not pursued any further, and we would get a list which we would be duly billed for" (tr. 13232).)

90. At this first meeting with Mr. Choate he seemed unwilling to discuss the newspaper in detail, though he did mention some problems. He did not then disclose the profitability or nonprofitability of the paper. Mr. Choate at first thought that Mr. Rosenfield and associates were connected with Mr. Garfinkle, but they disabused him of that belief. Until the meeting with Mr. Rosenfield had been under the impression that the newspaper was either a small loser or making about $150,000 a year "after a very sizable amount of depreciation" (tr. 13224); and although he did not consider this "a good operation for the size investment," he "was not particularly alarmed" (tr. 13224). But after his first meeting with Mr. Choate he agreed that he "determined to do something affirmative" about his Herald-Traveler investment (tr. 13224). (The 1953 Annual Report of the Herald-Traveler to stockholders contained separate financial information for WHDH, but this practice had been abandoned by 1962, when financial data were solely on a consolidated basis.)

91. A second meeting of Mr. Rosenfield, Mr. Ruan, and Mr. Lyon with Mr. Choate in Boston was arranged by Mr. Lyon, some time before October 18, 1963, while Mr. Choate was still president of the Herald-Traveler. The meeting was at Mr. Choate's home. Before going there Mr. Rosenfield and Mr. Ruan had met Mr. Dempsey, WHDH's communication counsel, and had discussed the TV litigation with him.

92. At the second Choate meeting newspaper affairs were discussed. Mr. Choate said that for the first time the newspaper in 1963 would show a substantial loss—$700,000 or $800,000 after depreciation. (However, it has been WHDH's "position throughout the proceeding that the Herald-Traveler newspapers did not, during any of the years discussed at the hearing, suffer a cash loss; that its [sic] operating position was always such that it produced sufficient cash revenue to pay all of its operating expenses. This is not a strained or narrow interpretation, as BBI charged when the same statement was made in a letter to stockholders by Akerson, but involves the normal and natural use of the words employed. Introduction of depreciation is important only for tax purposes and within rather wide limits it may be claimed in a manner so as to give an entirely different interpretation of profit or

loss position ranging from a black to a red figure, despite the fact that earned income may exceed operating expenses by a comfortable margin.") He said that he had been exploring the possibility of selling the newspaper to the Boston Globe, and its physical plant to the Record-American. Mr. Choate asked whether Mr. Rosenfield, Mr. Ruan, and Mr. Lyon would oppose the sale of the newspaper. Mr. Rosenfield testified that Mr. Choate "thought that serious consideration should be given to the sale of the newspaper and that the reason we were there [at the second meeting], the principal reason was to find out whether we, as stockholders, would oppose the sale * * *. Our answer was that if the directors considered that a sale of the paper was advisable and the price appeared to be right, we would certainly encourage him to sell it in view of the alarming information that he had given us as to the profit picture" (tr. 13297). After that day Mr. Rosenfield had no further conversations with Mr. Choate. But he tried to secure information from management at the annual stockholders' meeting in March 1964. (Mr. Lyon made another trip to Boston and saw Mr. Choate, Mr. Akerson, and other management people.)

93. The day before the March 1964 stockholders' meeting there was a meeting at which Mr. Rosenfield, Mr. Ruan, Mr. Akerson, Mr. Clancy, Mr. Hanify's associate Mr. Mercer, and others were present. The meeting was arranged by mutual consent to discuss common problems and possibly establish a working relationship. It was the first time Mr. Rosenfield had met Mr. Akerson. Mr. Rosenfield again tried to get the Herald-Traveler shareholders' list, but Mr. Akerson refused it. Mr. Rosenfield tried to question Mr. Akerson on newspaper operations; Mr. Akerson, however, was reluctant to reveal anything not public information. After about 1½ hours the Rosenfield group called a halt and decided to try to arrange another meeting with Mr. Akerson within a month or two after the annual meeting, when "he would try to determine what information he could give us and we could interrogate him with respect to what areas we could talk about" (tr. 13263–4). A new meeting date was named, but before it came around Mr. Rosenfield and Mr. Ruan brought their action for the stockholders' list, and Mr. Akerson wired them that because of the pendency of the action a meeting was inadvisable, so it was canceled.

94. Mr. Rosenfield secured proxies for the March 1964 meeting. "There are a lot of my friends that own stock," he said, "and I simply asked them to give me their proxies" (tr. 13260). He told these shareholders he was "going to try to get a couple of directors" (tr. 13260). Mr. Ruan and Mr. Lyon also got some proxies. In all they got proxies for some 170,000 shares, but at the meeting only about 140,000 were recognized. Even had all been recognized they would not have been able to elect directors (Massachusetts does not permit cumulative voting), so they did not contest "too fiercely throwing out the proxies, as long as they didn't throw us out" (tr. 13261).

95. At the stockholders' meeting Mr. Rosenfield read a prepared statement, in which he said that he was upset by the "profit picture" and wanted to see an improvement (tr. 13264). Either he or his friend Sidney Brody proposed that the board be increased from seven to nine; the proposal was voted down. Mr. Rosenfield and Mr. Ruan were then nominated for board membership, but were defeated.

96. In October 1963, 2 days before Mr. Akerson's promotion to president and publisher of the Herald-Traveler, Mr. Rosenfield had delivered a handwritten note to George Brown, Herald-Traveler director. The note (*a*) objected to making Mr. Akerson publisher; and (*b*) asked that a competent broker be secured to "probe the sale of the newspaper"; and "complete the sale provided satisfactory offer is received" (Greater Boston ex. J). Mr. Akerson, it should be noted, has expressed strong opposition to the sale of the newspapers. In a letter to stockholders dated December 18, 1964, he "emphasized that our newspaper operations always have been maintained on a self-supporting basis, independent of any other sources of income" (Greater Boston ex. K). In a "Publisher's Statement" appearing in the Herald-Traveler of September 18, 1964, adjoining a news article headlined, "Purchase Scheme Revealed—Globe Bid Aired [in the Rosenfield-Ruan action for the stockholders' list] To Liquidate H–T," Mr. Akerson said in part:

> These newspapers are growing and improving. They are not for sale to the Globe or the Record-American or anyone else.

A clipping was mailed to Herald-Traveler stockholders, including Mr. Rosenfield.

97. On October 18, 1963, Mr. Choate had been replaced by Mr. Akerson as president and publisher of the Herald-Traveler. When Mr. Akerson was questioned about his relationship with Mr. Choate, he testified that they had not disagreed over the question of selling the newspapers. On October 23, 1963, however, Mr. Akerson had distributed to union officials a confidential memorandum of notes of a meeting with union representatives the day before. The notes contain the following statements Mr. Akerson purportedly made at the meeting:

> The events of last Friday [October 18] took place because of a fundamental difference of opinion in the future of these properties that existed between Mr. Choate and me. He felt that it was in the interests of the stockholders to sell the newspapers. I disagreed with the idea of selling and the board is giving me a crack at making the newspaper properties profitable.
>
> * * * the board of directors agreed with me and in essence said "We will give you a chance, Mr. Akerson, to prove you are right." But obviously I won't get more than one time at bat.

(Although Mr. Akerson conceded that the notes had been prepared by him in advance of the meeting and that they had been distributed with his permission, he denied making the statements quoted above at the union meeting. He testified that he had prepared the notes as a mnemonic for his remarks, but had not followed them and had spoken from an outline instead; that afterwards union leaders asked him for a written summary of his remarks, as they had not taken notes, and their bylaws required something in writing; that he told them he had not said what was in the notes; that they said they realized he had not, but that they needed a written account, so he gave them the notes as the only thing available (the outline was ununderstandable) with a caution that they be treated "with the utmost caution and discretion.")

98. Mr. Rosenfield is chairman of the board of Younker Brothers, Inc., Des Moines department stores. In the past 5 years he has not had a 25 percent or greater interest in any other business. He is also a

director of Iowa Power and Light Co.; Munsingwear, Inc.; Bankers Trust Co., of Des Moines; Mid-American Publishing Co., which publishes small Iowa newspapers; and Towne Mines, Inc., which operates Mexican mines. Mr. Rosenfield does not own as much as 1 percent or have any reportable interest in any other broadcast facility.

99. John Ruan bought Herald-Traveler stock at Mr. Rosenfield's suggestion, and, as indicated above, is an associate of his. He has "invested in this venture and relied mostly on Mr. Rosenfield, and I would say that for every hour that I have spent on it, maybe Mr. Rosenfield might have spent 20 hours" (tr. 13184). He has known Mr. Rosenfield for 30 years. WHDH ex. 7B shows him as owning 20,190 shares of Herald-Traveler stock. This holding has apparently been increased, as in its proposed findings WHDH writes that Mr. Ruan owns 24,190 shares. His wife, Elizabeth J. Ruan, held about 5,500 shares at the time Mr. Ruan testified in December 1964 (since increased, as noted below, to 5,704 shares).

100. Mr. Ruan was born in Beacon, Iowa, in 1914, and lives in Des Moines. He is president and owner of Ruan Transport Corp., a trucking business. In the past 5 years he has not owned as much as 25 percent of any other business, and he does not own as much as 1 percent of any broadcast interest except through his ownership of Herald-Traveler stock.

101. Salkeld & Co., established in New York in 1929, is a nominee partnership of Bankers Trust Co. of New York. The partnership was formed solely to register in its name for convenience securities of Bankers Trust's customers. Salkeld is not the beneficial owner of any Herald-Traveler stock; it votes the stock only on the instructions of the beneficial owners. Of the 22,271 shares of Herald-Traveler stock held of record by Salkeld, 16,309 are owned beneficially by Central Life Assurance Co. of Des Moines, Iowa. All the officers and directors of Central Life are citizens of the United States, and the company does not own as much as 1 percent of any other broadcast facility. No other person for whom Salkeld is nominee owns as much as 1 percent of Herald-Traveler stock.

102. Of the remaining 6,462 shares of Herald-Traveler stock held by Salkel, 6,334 shares (1.17 percent) are owned by Frances L. Brody, Sidney F. Brody, and Dana Latham as trustees under three separate Trusts. The Frances Lasker Income Trust has 1,040 shares; the Frances Trust 1,520 shares; and the Frances Insurance Trust 3,774 shares. There is no record evidence of the person who exercises the voting power on the trusts stock; as to the possible ownership interest in or official connection with any other broadcast facility of either the trustees or the beneficiaries, or the identity of or citizenship of the beneficiaries.

103. *One Percent Stockholders.* As of July 16, 1965, when the record was first closed, the following persons were shown by WHDH on form 323 to own as much as 1 percent but less than 3 percent of Herald-Traveler stock; Clem & Co., 10,320 shares; Dan Dugan Investment Co., 5,979; John F. Frawley & Co., 13,703; North Baton Rouge Development Co., 10,000; Elizabeth J. Ruan, 5,704; Maurice Simon, 10,078; and Robert Winslow, 5,715. On July 20, 1965, it was reported

on form 323 that Lill & Co., a nominee for First National Bank of Jersey City, held 7,600 shares. The beneficial owner of this stock is Television-Electronics Fund, Inc., Chicago. (Also as nominee for the Fund Lill holds 115,500 shares (2.48 percent) of American Broadcasting Companies, Inc. (see form 323, dated January 24, 1966), 35,000 shares (2.57 percent) of Capitol Cities Broadcasting Corp. (see form 323, dated July 30, 1965); an unspecified number of shares (2.42 percent) of Storer Broadcasting Co. (see letter report of January 17, 1966); 30,000 shares (1.158 percent) of Scripps-Howard Broadcasting Co. (see form 323, dated December 10, 1965); and 95,000 shares (1.02 percent) of Zenith Radio Corp. (see form 323, dated March 9, 1965). All these corporations are Commission licensees. ABC and Storer each owns five TV stations, Capitol Cities five, including one satellite, and Scripps-Howard four.) Official notice is also taken that on March 25, 1966, Mr. Talmadge filed an affidavit with the Commission which states that Lill & Co. furnished the Herald-Traveler a proxy to be voted by management.

104. Clem & Co., a partnership, is a nominee for Old Colony Trust Co., of Boston, and is not the beneficial owner of the stock which stands in its name. All Clem partners are U.S. citizens. Voting rights to all but 515 of the shares (the record, WHDH ex. 7C–1, says "all of the shares," but WHDH's proposed findings, without record reference or other citation, says "all but 515"; in the absence of any refutation the revised number is here accepted) are exercised by George R. Brown, Herald-Traveler director. There is no record evidence of the identity of the Clem partners, of their ownership interest in or official connection with another broadcast facility, or of the ownership interest of the partnership in another broadcast facility.

105. Dan Dugan Investment Co. is a family partnership about 10 years old, which owns and controls all the stock in its name. The partners are Dan Dugan, Sioux Falls, Iowa, and his four daughters, Mrs. Ellen Everist, Sioux Falls; Mrs. Virginia Rozum, Mitchell, S. Dak.; Mrs. Genevieve DeLucci, and Lucille Dugan, San Francisco, all U.S. citizens. The stock is voted by Dan Dugan, managing partner. The partnership owns no stock in any other broadcast facility. The record does not say whether the individual Dan Dugan partners have an ownership interest in or official connection with another broadcast facility.

106. John F. Frawley & Co. is the nominee of Scudder Special Funds, Inc. The Fund's custodian is State Street Bank and Trust Co. of Boston. The Fund was incorporated in Delaware in 1956. It is an open-end management investment company registered under the Investment Company Act of 1940, as amended. Neither State Street Bank nor Frawley has any voting rights in the stock. Frawley votes it only in accordance with specific instructions of Scudder, the beneficial owner. All officers and directors of Scudder are U.S. citizens. It does not own as much as 1 percent of any other broadcast facility. The record does not disclose the identity of the individual Frawley partners, their citizenship, or whether they have an ownership interest or official connection with another broadcast facility, whether the partnership has an interest in another broadcast facility; the citizen-

ship, ownership interest in, or official connection with any other broadcast facility of the officers, directors, or stockholders of State Street Bank, or whether the bank has an ownership interest in another broadcast facility. There is no record evidence as to an ownership interest in or official connection with another broadcast facility on the part of the officers, directors, and stockholders of the Scudder Fund.

107. North Baton Rouge Development Co. was incorporated in Louisiana in 1946. Its officers, directors, and stockholders are all U.S. citizens. It does not own stock in any other broadcast facility. Whether its officers, directors, or stockholders have an ownership interest in or official connection with another broadcast facility does not appear in the record.

108. Elizabeth J. Ruan, a U.S. citizen, and, as stated above, wife of John Ruan, does not hold a 1 percent interest in any other broadcast facility.

109. Maurice Simon is a Boston lawyer. He does not own any interest in another broadcast facility.

110. Robert Winslow, director of building services for the Herald-Traveler, Kenelm Winslow's brother, is a U.S. citizen. He has been a stockholder of at least 1 percent for more than 16 years. WHDH declares in its proposed findings that the "Commission's files show that he has no other reportable interest in a broadcast licensee."

111. *Citizenship of Shareholders.* Of the Herald-Traveler stock, 489,579 shares, or 92.6 percent of the outstanding stock, was owned as of March 31, 1964, by U.S. citizens. None of these stockholders is a representative of an alien or of a foreign government. In its proposed findings WHDH suggests a finding, verbatim, except for a slight change in percentage, with a passage in its ex. 7D–1: "There is no information available upon which it can be inferred that the holders of any of the remaining 7.4 percent of the stock are aliens of [sic] foreign governments or representatives of either." It adds as a transcript reference tr. 11703. It appears from the generality of the exhibit reference, which is not documented by the transcript cited, that what WHDH means is that it has no specific information in its possession from which it could infer one way or the other about the remaining 7.4 percent, though it chooses to believe that they are citizens and nonrepresentatives.

112. Under date of December 21, 1945, in connection with the application of The Boston Herald-Traveler Corp. to acquire WHDH, a representation was made to the Commission by W. C. Wenderoth, treasurer of the Boston Herald-Traveler Corp. as well as of Fidelity Broadcasting Corp., its wholly owned subsidiary, through which it proposed to acquire the stock of Matheson Radio Co., Inc., the licensee of WHDH, that:

> As treasurer of the Fidelity Broadcasting Corp., transferee in the above-entitled application, I have been making a study of the list of stockholders of the Boston Herald-Traveler Corp. to determine the citizenship of each of the stockholders. As of this date, I have determined that the holders of 307,355 (76.85 percent) of the 400,000 authorized shares are citizens of the United States, or are domestic corporations. The holders of these 307,355 shares are persons or corporations known to the officers and directors of the Boston Herald-Traveler Corp. to be citizens or domestic corporations, or are persons who have been reached

by telephone by officers or directors of the corporation or by employees working under the direction of the officers, and who have stated that they are citizens of the United States. The holders of these 307,355 shares represent 376 of the 2,174 stockholders. Included in this group is every stockholder who, as of September 29, 1945, held more than .25% (1,000 shares) of the corporate stock. In our study we have not to this date found any stock to be held by or for aliens. The remaining 23.16 percent of the stock is distributed among 1,798 stockholders.

At the time of the mailing of the next corporate dividend of the Boston Herald-Traveler Corp., a form will be sent to each stockholder of record so that each may supply complete data concerning citizenship. In this way all of the information relevant to citizenship of the remaining stockholders will be ascertained. As the Commission has been informed by our Washington attorneys, our transfer agent will be requested to notify us in the future of the citizenship of each new stockholder.

The Commission granted its consent to the transfer of control from Matheson Radio Company, Inc. to Fidelity Broadcasting Corp. Since then the Herald-Traveler has followed the practice of having a questionnaire sent to each new stockholder of record by the transfer agent, Old Colony Trust Company. The questionnaire slips are accompanied by an envelope addressed to the treasurer of Herald-Traveler.

113. Not all the questionnaires are returned. Where the owner of a large block of stock does not return the questionnaire, further inquiry is made to ascertain citizenship. If the stockholders are personally known to the Treasurer or another corporate officer, the follow-up inquiry is omitted. The foregoing figures on citizenship are based on returned questionnaires, follow-up inquiries, and personal knowledge of Mr. Talmadge, Herald-Traveler treasurer. (See also, pars. 114–115, below.)

114. On March 31, 1964, the corporation sent out fresh questionnaires to all stockholders holding 1 percent or more of its stock, even where it had previous information about the citizenship. Also questionnaires were sent to all stockholders owning less than 1 percent but more than a certain cutoff figure (either 300 or 400 shares) from whom information as to citizenship had not been obtained.

115. The results were tabulated against the stockholders list as of March 31, 1964. The first category was composed of shareholders who had returned the questionnaires on which citizenship information was requested. A total of 357,192 shares was represented by the questionnaires returned; this was 67.6 percent of the outstanding stock. The second group consisted of stockholders to whom follow-up written inquiries were sent. This group was composed of 1 percent or larger stockholders and less-than-1-percent stockholders who had not returned questionnaires. There was a total of 116,835 shares in this group held by stockholders who had not previously reported, or 22.1 percent of the outstanding stock. Mr. Talmadge testified that there was no overlap between the two groups and that no stockholder was counted twice. The third group consisted of 30 to 40 stockholders who had not returned questionnaires, but who to Mr. Talmadge's knowledge or belief were citizens (employees, children of stockholders known to be citizens, and domestic corporations). They held 15,552 shares, or 2.9 percent of outstanding stock. The total for the three categories was 489,579 shares, or 92.6 percent of the outstanding stock.

116. *Changes in Stock Ownership.* The Boston Herald-Traveler Corp. is a publicly-owned company. Its stock is traded over the counter. Quotations on the stock are listed by the National Association of Security Dealers and are published in The Wall Street Journal and The New York Times, as well as in The Boston Globe and The Boston Herald. When the Herald-Traveler acquired WHDH, it had 376,805 shares of stock outstanding. In March 1965, it had 539,855 shares outstanding, the increase resulting from stock dividends (138,957) and exercise of stock options (24,093) by employees of the Herald-Traveler and of WHDH.

117. At the annual stockholders' meeting for the years 1946 through 1965, the amount of shares voted ranged from a low of 65.5 percent in 1946 to a high of 91 percent in 1965. The number of shares outstanding, the total number voted and the number voted by proxy at each meeting are shown in the following tabulation:

Annual meeting	No. of shares outstanding	Number of shares of stock voted	Voted by proxy
Mar. 19, 1946	376,805	247,483	187,677
Mar. 18, 1947	376,805	264,093	207,183
Mar. 16, 1948	376,805	282,919	262,272
Mar. 15, 1949	376,805	282,942	224,646
Mar. 21, 1950	376,805	316,265	253,002
Mar. 20, 1951	376,805	319,997	269,886
Mar. 18, 1952	376,805	297,846	254,329
Mar. 17, 1953	376,805	275,379	228,889
Mar. 16, 1954	376,805	296,184	250,634
Mar. 15, 1955	376,805	289,882	279,854
Mar. 20, 1956	376,805	281,225	232,561
Mar. 19, 1957	376,805	282,096	261,004
Mar. 18, 1958	391,578	278,199	226,497
Mar. 18, 1959	411,472	295,257	276,448
Mar. 18, 1960	427,031	289,819	235,891
Mar. 21, 1961	449,328	322,105	302,995
Mar. 20, 1962	472,397	332,166	282,969
Mar. 19, 1963	496,017	353,425	331,567
Mar. 18, 1964	528,257	460,545	[1] 319,276 [2] 140,925
Mar. 16, 1965	539,855	494,861	[1] 336,903 [2] 156,883

[1] Management.
[2] Other.

118. While the Herald-Traveler has owned WHDH, the Commission took some 30 actions on applications filed by WHDH. A tabulation would show the date of the action, the nature of the action, the last date before the action upon which WHDH brought its ownership file up to date, and the manner in which the ownership information was submitted. Analysis was made of Herald-Traveler stockholder lists as of 16 of the dates on which its ownership data were brought up to date before Commission action on these applications. In general, to the extent practicable the dates selected preceded Commission actions, which were about a year apart. The dates are: September 21, 1945; December 31, 1945; December 31, 1946; December 31, 1947; September 14, 1949; July 25, 1950; January 23, 1951; September 19, 1952; December 31, 1953; September 21, 1954 (when the Commission approved the transfer of control application eliminating Fidelity Broadcasting Co. as a holding company; this is the latest such application on rec-

ord); March 22, 1957; August 31, 1959; March 21, 1961; August 31, 1962; April 30, 1963; and October 18, 1963. A similar analysis was made of the stockholders' lists for October 31, 1964, a date selected by counsel for other parties to the proceeding. These analyses showed the number of shareholders and the number of outstanding shares on the date in question, the number of persons who were not shareholders on the next preceding date but who were shareholders on the date in question, and the total number of shares held by these persons. In addition, the number of persons who were shareholders on the last preceding date but who were no longer shareholders on the date in question, and the total number of shares owned on the last preceding date by such persons were shown; as were the number of shares held in the names of persons believed to be acting for others and the number of such persons holding shares. A similar but somewhat more detailed analysis was made of the shareholdings on these dates of persons owning 1 percent or more of the company's stock and who, for that reason, were reported to the Commission. (Only 3 percent holders are included for September 21, 1945.) The shareholdings of officers and directors of the corporation on the dates in question were also tabulated, and also whether an officer or director on a given date had held such position on the next preceding date. This analysis showed that not more than two persons were members of the board on any given date who had not also been members on the next preceding date.

119. The largest number of shares held by any single stockholder while the Herald-Traveler has owned WHDH is 83,303 (15.4 percent of the outstanding stock), the number held in the "Garfinkle" voting trust. The largest amount of stock ever disposed of at one time was 76,000 shares (14.4 percent of the then outstanding stock), which went to two purchasers, one taking 50,000 (John Blair & Co.) and the other 26,000 (Herman E. Muller). This 76,000 included the stock held in the Sidney Winslow estate and in other trusts for which Old Colony Trust Co. was a fiduciary. No other transaction involved the acquisition by any one person or group ostensibly in privity of as much as 1 percent, and no other transaction involved a single sale of more than 1 percent, except in the case of disposition by a trust or an estate. John Blair & Co., the second largest stockholder, owns less than 10 percent of the outstanding stock. None of the other persons owning more than 1 percent of the stock has as much as 5 percent of the company's outstanding stock. Mr. and Mrs. Ruan, the only stockholders who individually own as much as 1 percent and who can be said to be ostensibly in privity (apart from the association between Mr. Rosenfield and Mr. Ruan), have a combined total holding of slightly over 5 percent. On August 31, 1959, 980 persons who were not stockholders on March 22, 1957, had acquired a combined total of 114,621 shares (27.9 percent of the total outstanding). This amount was greater than the corresponding total during any other interval between any two consecutive dates listed in par. 118, above. During this same 2½-year interval (the second longest involved), 1,381 persons who were stockholders at the beginning sold out their combined holdings of 116,712 shares (28.4 percent of the total outstanding). In no other period was the total amount acquired by new holders as much as 25 percent, and in

only one other period did holders dispose of this much (25.4 percent in the 2½-year period from September 21, 1954, to March 22, 1957). The information required to be filed with the Commission in 1945 for consideration of the qualifications of WHDH to become a licensee through transfer of control from Matheson, insofar as the stockholders are concerned, was the identity of stockholders owning 3 percent or more of the company's stock. Four such persons were listed in the application, which showed that they owned a combined total of 89,314 shares (23.7 percent of the total outstanding). After the Commission approved the transfer of control, Herald-Traveler was required to file, as are all corporate licensees having more than 50 stockholders, information disclosing the identitfy of the holders of 1 percent or more of the company's stock. The first filing, made in 1946, listed 16 persons as 1 percent stockholders, holding a combined total of 161,869 shares (43 percent of the total oustanding). On March 31, 1964, 528,257 Herald-Traveler shares were outstanding. As of October 31, 1964, 15 persons were in the 1 percent stockholder category, holding a combined total of 294,595 shares (55.6 percent of the total outstanding). Also disclosed to the Commission were the holdings of officers and directors of Herald-Traveler who owned less than 1 percent of the company's stock. The combined holdings of such persons totaled 13,343 shares (2.52 percent of the total outstanding).

120. From September 21, 1945, to March 22, 1957, 4,422 new stockholders (in the sense only, however, that they do not appear on a list of the next preceding tabulation date) acquired 335,196 shares, and 3,847 stockholders disposed of 339,723 shares. From March 22, 1957, to October 31, 1964, 1,896 "new" stockholders acquired 486,186 shares, and 3,191 stockholders disposed of 451,345 shares. On September 21, 1945, there were 2,175 stockholders and 376,805 Herald-Traveler shares outstanding; on March 22, 1957, 2,776 stockholders and 376,805 shares; and on October 31, 1964, 1,470 stockholders and 529,403 shares. As of October 31, 1964, 12 stockholders, none of whom held a reportable interest in Herald-Traveler stock as recently as January 15, 1960, held 269,617 shares, or 50.9 percent of the outstanding stock.

121. On September 21, 1954, the members of the board of directors of Herald-Traveler were:

Sidney W. Winslow, Jr.
Robert B. Choate
George R. Brown
Channing H. Cox
Kenelm W. Winslow
John M. Hall
Carl J. Gilbert

Between that date and Mr. Choate's death on December 21, 1963, the board lost three other members: Sidney W. Winslow, Jr., by death; and Messrs. Cox and Gilbert by retirement. (See, also, par. 60 above.)

122. Mr. Akerson testified "No" in answer to a question whether he thought "it would be a good idea to increase the board to nine so that Mr. Rosenfield and Mr. Ruan could become directors," "because it has always been the policy of our company and enunciated in the beginning by our president, Sidney Winslow, that the board would reflect confidence of all stockholders without representation of blocks of stock"

(tr. 17653). No single stockholder, or group of stockholders acting in concert, has ever succeeded in rejecting a management proposal, initiating a new company policy, or substituting a different director or officer for one proposed by management.

123. In its decision granting WHDH's application for construction permit, the Commission found (13 R.R. 507, 521):

> Sidney W. Winslow, Jr., and members of his family hold about 23 percent of the issued and outstanding stock in Herald-Traveler which is the principal holding. It is established that Mr. Winslow, the president, is the "major factor in whatever is done by the Herald-Traveler board of directors." The last annual stockholders' meeting of the Herald-Traveler was held in March 1954, at which time 45,550 shares were voted in person and 250,634 shares were voted by the outstanding proxy committee composed of Messrs. Sidney W. Winslow, Jr., Channing H. Cox, and James Garfield.

Mr. Winslow died on July 14, 1963. The Herald-Traveler stock held by his estate and most members of his family was sold on February 20, 1964 (see above). Robert B. Winslow and Kenelm W. Winslow remain as Herald-Traveler stockholders, with a total ownership of 10,652 shares.

124. In its 1957 decision granting WHDH's application for channel 5, Boston, the Commission found that Herald-Traveler stockholders owning about 64 percent of its stock lived in the Boston area (13 R.R. at 521, 22 FCC at 774). On the date the record was originally closed, July 16, 1965, 46.84 percent was owned beneficially by 1-percent-or-more stockholders living outside the Boston area—the percentage would be higher if all stockholders were considered. On September 21, 1954, stockholders owning 72.7 percent of the Herald-Traveler stock lived in New England. By December 28, 1964, the figure had dropped to 27.1 percent (WHDH asserts, step III, p. B(b)(1)–1: "It is the position of WHDH that the geographical distribution of its stockholders is of negligible importance in this proceeding.")

125. From 1959 to 1964 the Herald-Traveler received cash dividends from WHDH, Inc. of $6,935,000. In the same period the Herald-Traveler paid no cash dividend to its stockholders. The dividends received from WHDH were used in repayment of debt for which the newspaper plant was part of the pledge.

126. BBI proposes a finding (step II, p. 21), in which the Broadcast Bureau in effect concurs, that WHDH conceded "that not later than October 18, 1963," when Mr. Akerson was elected president and publisher of the Herald-Traveler and Mr. Choate was made chairman of the board and left with jurisdiction over radio and TV operations, de facto control of the newspaper was transferred from Mr. Choate to Mr. Akerson; that this situation continued until December 21, 1963, when Mr. Choate died; that by "November 1, Akerson for all practical purposes was in actual control of the broadcast operations * * * and when on December 26, 1963 he was elected president of WHDH, he was given formal control as well * * *. At no time has Commission consent, prior or subsequent, been sought for any of these events." In its step III proposed findings, however (p. C(b)(1)–1) WHDH counters this proposal with the following statement:

> BBI equates "de facto" control of Herald-Traveler with the holding of the office of president of that corporation. It cites Herald-Traveler bylaws which make

the president of the company the chief executive officer. This is not an unusual provision. Every corporation has a chief executive officer. Ordinarily he is the president but, by whatever title, executive power rests, ordinarily, in one person. Changes in the chief executive officer of licensee corporations have never been construed by the Commission to come within section 310(b), and executive control exercised by the chief executive officer of a licensee corporation has never been considered by the Commission to be "working control" as the term is used in Commission consideration of 310(b) matters. While WHDH has no disposition to quibble about terms, it would seem appropriate to call the executive power vested in the president by the corporation's bylaws de jure, not de facto, power. Changes in the identity of the person who wields such power as an officer of the corporation do not require either prior or post Commission approval. BBI's [proposal] should be rejected in its entirety as immaterial.

A decision on these conflicting contentions will not be made at this point, but will appear in the conclusions.

127. *WHDH AM and FM facilities.* The Herald-Traveler Corp. purchased Matheson Radio Co., Inc., and, with Commission consent became licensee of WHDH in 1946. The WHDH AM station was then operating on 850 kc. with a power of 5 kw. FM facilities consisted of an experimental station operating on 100 mc.

128. Physical assets of WHDH when it was acquired from Matheson included a transmitter in Saugus, Mass., two studios and office space in a downtown Boston hotel, studio technical equipment and office furnishings and fittings, and the experimental FM transmitter plant at Framingham, Mass. The AM plant, constructed with war-time materials and under priority control, had an inordinate number of outages. The hotel studios were two relatively small rooms with a control room crowded with equipment. The offices were ordinary hotel rooms. The experimental FM plant was unpretentious. WHDH got a regular commercial FM authorization, after comparative hearing, in 1947.

129. Steps were taken to expand and modernize the operation. A. Earl Cullum, Jr., of Dallas, was, and still is, retained on a regular basis as the company's consulting engineer, with standing authority to make continuing studies of developments in equipment, engineering practice and art, and regulatory measures which could improve the company's service. The company acquired new studios and built modern offices. It installed new AM studio equipment and incorporated many technical features in the studio, at a cost of about $225.000. It also improved transmitting facilities. The AM station's power was increased to 50 kw. These transmitting facilities, of modern and efficient design, are supplemented by complete auxiliary transmitting facilities, and cost about $650,000. In March 1949, WHDH–FM began operating with 50 kw. ERP and effective antenna height of 455 feet, from the John Hancock Building. In 1951 the WHDH engineering department undertook to develop the first FM remote control system. The Commission approved the system on a regular basis in 1953. Up to that time WHDH had spent about $75,000 on the FM transmitter plant.

130. As already noted, the TV station began operating in November 1957. In December 1958, WHDH filed an application to move the WHDH–FM transmitter facilities from the John Hancock Building to the WHDH–TV site. The Commission granted the application,

and WHDH–FM started operation from the new site in January 1960. Using the WHDH–TV tower at the site west of Boston, the FM station operates with an effective radiated power of 3.25 kw. and an effective antenna height of 979 feet above average terrain. These were the maximum facilities permitted in zone 1 at the time of the move. In January 1960, on completion of the new facilities, WHDH moved its entire business and studio operation—AM, FM, and TV—to 50 Morrissey Boulevard, Boston, its present location.

131. *WHDH AM and FM programing.* When the Herald-Traveler assumed control of WHDH in 1946, the station was an ABC affiliate. Under its former management local programing had included a large number of recordings, as well as paid religious broadcasts and weekly programs sponsored on a regular basis by political organizations. The company's first step was to hire William B. McGrath as the station's manager. Its objective was to make WHDH an independent (nonnetwork) station. Mr. McGrath immediately set about changing the pattern of WHDH operation by increasing and changing its staff, key personnel, and talent. He instituted new programing ideas and formats, and a revision of the station's news policy and news-gathering facilities. He placed key personnel like announcers, talent, and personalities, in charge of programing features in entertainment, agriculture, discussion, and news. Audience surveys were taken.

132. In the Fall of 1946 WHDH set out to try to become a leading sports station. It secured rights for play-by-play broadcasts of the Boston professional football team, and in the spring of 1947 rights to all the home games of the two major league baseball teams in Boston, which was then represented in both the American and National Leagues.

133. WHDH had a collection of only 300 records when the Herald-Traveler bought it. The continuing addition of new musical numbers resulted by 1954 in a collection of more than 100,000 different numbers, and at present of more than 180,000. The collection is cross-indexed and the records easily accessible. However, though WHDH has been steadily increasing its recorded musical collection over the years, station management has always used live musicians as well.

134. Station WHDH (AM) continues to operate as an independent, nonnetwork station. It broadcasts 24 hours a day. The FM station duplicates the AM programs. Official notice was taken of the fact that the AM and FM stations regularly filed applications for license renewal, and that the licenses have been repeatedly renewed.

135. *WHDH television application and development.* In 1947 WHDH asked Mr. Cullum to undertake studies for television service to Boston and eastern New England. He made studies of outstanding construction permits, the allocated channels, and possible sites from which maximum power might be provided in light of the limitations then in effect on power and antenna height. He made recommendations, and as a result an application for construction permit was filed on December 15, 1947, file BPCT–248. It proposed an operation on channel 13 with an effective power of 29 kw. and an effective antenna height of 493 feet above average terrain. The transmitter was to be on top of the John Hancock Mutual Life Insurance Building in down-

town Boston, with studios nearby at 6 St. James Avenue. The video and studio facilities were up to the standards of the time. The WHDH television application was designated for hearing with other applications in early 1948, but was caught in the freeze. It remained in hearing status during most of the freeze; the hearing was canceled before the issuance of the sixth report and order.

136. With a hope of furnishing early services WHDH had obtained Commission approval to erect a television antenna on the tower of the John Hancock Building, which was then under construction. The antenna on what was then the tallest building in Boston was over 500 feet high, and was erected in late 1948.

137. During the freeze WHDH participated directly and through its consulting engineers in all phases of the television allocation hearing, dockets Nos. 8736, etc. It proposed that five VHF channels be allocated to Boston and that increased effective radiated power and antenna height be permitted. In September 1951, WHDH instituted engineering and other studies and, after meetings with State and Federal agencies, proposed on March 9, 1954, together with CBS, the establishment of the Newton Triangle antenna farm. The Washington airspace subcommittee recommended approval of the antenna farm on March 15, 1954; at the same time it approved the proposal of WHDH to erect a 1,250-foot structure with a height of 1,349 feet above mean sea level.

138. While its application was dormant in the freeze WHDH continued active preparation for television. It began "its contacts and consultations with local groups and individuals in the preparation of its application in 1948" (exhibit 13–B), and renewed them in 1953. In March 1948, the Herald-Traveler assisted WHDH in a series of television photography experiments concerning news story coverage and film techniques. In May 1952, WHDH converted its largest AM studio space (about 40′ x 40′) into a production area for closed-circuit television programs. It bought and installed two camera chains, lighting, and other equipment. Ten members of the WHDH engineering department were selected for extensive television training. Eight of the 10 trainees had completed television engineering courses. From November 1953, to July 1, 1954, WHDH engineers spent about 2,240 hours in helping produce programs in the WHDH experimental studio. In December 1953, WHDH began closed-circuit experiments to train its programing staff for television. This included the production and rehearsal of proposed programs, and testing them before incorporation into the amended application. The research and experimentation covered various fields, including "public service" programs. Programs which had been discussed with local organizations were tried out on closed-circuit.

139. The sixth report and order became effective on June 2, 1952. WHDH directed its engineers to prepare a revision of its still-pending application, BPCT–248, consistent with the new rules. It filed an amendment on July 16, 1952, specifying channel 5 with an effective power of 100 kw. Because negotiations were continuing with the CAA and the airspace subcommittee for approval of a site at which a taller antenna might be erected, WHDH continued to specify the John Han-

cock Building with an effective height of 493 feet above average terrain. Following the March 16, 1954 action of the airspace subcommittee, approving the WHDH proposal to erect a 1,250-foot structure, 1,349 feet above mean sea level, WHDH began to prepare a further amendment to its application. On April 5, 1954, the amendment was filed to specify operation on channel 5 with an effective radiated power of 65.2 kw. and an effective antenna height of 1,138 feet above average terrain surrounding the proposed site at Newton, Mass. On June 16, 1954, the Commission designated the WHDH application, BPCT–248, for comparative hearing with other applications for channel 5. The WHDH application for construction permit was granted April 26, 1957, and the call letters WHDH–TV were assigned. The station was constructed and the applications for license were filed within 6 months, or 2 months less than the 8-month limit of the construction permit.

140. In July and August 1958, WHDH engineers made a field intensity survey of the channel 5 operation. They made measurements along 16 radials from 20 to 80 miles, except where the ocean intervened at lesser distances. The field data were analyzed and an engineering report was filed with the Commission on September 9, 1958, which showed that WHDH–TV was providing coverage as proposed in its application for construction permit.

141. WHDH has maintained an active interest and participation in Commission proceedings on allocation or other television development matters. It has opposed any attempt through rulemaking to reduce the allocations to Boston, and has supported proposals to improve broadcast techniques, as by remote pickup transmitters. Following the Commission's rulemaking proposal in docket No. 14229 (*Fostering Expanded Use of UHF Channels*), in September 1961, WHDH submitted an application for a UHF station to operate on channel 23 in Boston which would duplicate the programs of WHDH–TV. The proposed UHF station would have used WHDH–TV's antenna tower, its transmitter house, studios, and other facilities, at an estimated cost of $347,563. The UHF application was submitted in anticipation of the adoption of the rules proposed in docket No. 14229, but on October 18, 1962, the Commission advised WHDH that it would not accept the application for filing and returned it. The proposal in docket No. 14229 to permit dual VHF–UHF operation has since been abandoned with the termination of docket No. 14229.

142. *Staff.* In its broadcast operations WHDH employs 227 persons. Of this number, 109 are assigned exclusively to television, 84 to both TV and AM–FM, and 34 to AM–FM exclusively. Of the 193 persons assigned exclusively or partly to TV, 169 have worked for WHDH for 3 years or more; 134 for 5 years or more; 37 for 10 years or more; 26 for 15 years or more; 8 for 20 years or more; 4 for 25 years or more; and 2 for 30 years or more (in the last three cases, of course before the applicant took over operation of the AM station).

143. WHDH–TV department heads (other than officers) are:

(*a*) David Abbott, national sales manager. Joined WHDH–TV in 1957. Former WBZ–TV, Boston, traffic and continuity director and television news and sports writer. Produced the first local television news program in Boston. New England sales representative for MCA–TV, and for 3 years New England manager for

Official Films, Inc. Four-year veteran of U.S. Army, including the 10th Mountain Division. A native resident of Boston.

(*b*) Philip K. Baldwin, chief engineer. Joined WHDH–AM–FM in 1946. Holder of amateur operator and station licenses since 1916 and has held a commercial operator's license since 1919. He held numerous radio engineering positions in the New England area since 1924. Former chief field engineer, communications division, Raytheon Manufacturing Company. Former captain, U.S. Army Air Corps, as radio officer in the O.S.S. A native resident of the Boston area.

(*c*) Virginia K. Bartlett, executive producer of "Dateline Boston" (see below). Joined WHDH–TV in 1957. Her "Dateline Boston" programs twice (in 1961 and 1963) were recognized by McCall's Magazine with Gold Mike Awards for "service to America's future." In 1960, was awarded a mass media fellowship from the fund for adult education, and during a 6-month leave of absence traveled 30,000 miles to visit more than 100 television stations in a study of "public service" television programing. A Boston area resident 1957–1964. Her husband is now head of the history department at Carnegie Institute, Pittsburgh, where Mrs. Bartlett now lives, though she continues with WHDH–TV.

(*d*) Margaret Davy, associate producer of "Dateline Boston." Joined WHDH in 1963. Began her career in communications in Pennsylvania. Former press, radio, and TV correspondent at the United Nations for Voice of America. Former East and West European Affairs editor and New York City press coverage officer for U.S. Information Agency. Born in Brockton, Mass.

(*e*) Curt Gowdy, director of sports for WHDH–TV and radio. Joined WHDH in 1951. Sports broadcaster of Red Sox baseball. Has broadcast baseball all-star game; NBC–TV—National Basketball Association game of the week; world series; Cotton Bowl game; Sugar Bowl game; 1964 winter olympics for ABC–TV. U.S. Army Air Corps veteran. Resident of Boston area. Mr. Gowdy owns AM station WCCM, Lawrence, Mass., 25–30 miles from Boston.

(*f*) Paul A. Hurd, engineer-in-charge, WHDH–TV transmitter. Joined WHDH 1957. Has held first-class radio-telephone operator's license since 1940. Responsible for installation of main studio and remote studio facilities of WCCM, Lawrence, Mass. Former chief engineer WHAV–WHAV–FM, Haverhill, Mass. Former broadcast field engineer, RCA Service Co., broadcast division, traveling extensively throughout the country supervising construction, installation and service of RCA equipment in a variety of television stations. Named to present WHDH position 1963. A U.S. Navy veteran. Born in Somerville, Mass.

(*g*) Joe Kelly, farm and food director of WHDH–TV and radio. Joined WHDH 1945. Formerly a traveling representative for the General Electric Co. in the promotion of rural electrification throughout New England and the four eastern provinces of Canada. Has been active in farm news broadcasting on WHDH–Radio since 1945. In 1959 was named the broadcaster "most effectively presenting agriculture to the community" by the American Farm Bureau Federation, the only time this award was made to any radio or television personality in New England. A native resident of the Boston area.

(*h*) Joseph Levine, director of television programs and operations. Joined WHDH–TV in 1957. Former newspaper reporter in Boston; Liverpool, England; Springfield, Mass. Associated with Boston office of United Press, 1946–1951; WHDH–Radio news supervisor, 1951–1953; associated with Boston Traveler 1953–1957. U.S. Army veteran. Born in Boston.

(*i*) Henri Lion, Sr., director of scenic design. Joined WHDH 1957. For 10 years with Paramount Theatre Corp. Following military service was for 12 years art director of a Boston department store. During World War II for 3 years designed topographic maps and relief panorama for U.S. Government. He was associated with the U.S. Air Force for 4 years designing topographic maps. A resident of the Boston area.

(*j*) Sidney Pike, television program manager since 1960. Joined WBZ–TV, Boston, in 1950 as a producer-director, producing "public service" television documentaries, sports and children's programs until 1957, when he joined WHDH–TV as a producer-director. Has produced a wide variety of television programs for WHDH–TV, including extensive coverage of Red Sox baseball. U.S. Army veteran. A native resident of the Boston area.

(*k*) George St. Andre, engineer-in-charge, television studios. Formerly served in a variety of engineering positions with New England Broadcasters, 1949–1951;

and former television field engineer in New England and New York State for Raytheon Manufacturing Co. Joined WHDH–Radio in 1953 as a studio engineer and was responsible for the television equipment used in the WHDH experimental studios. Named WHDH–TV studio supervisor 1957 and to his present position in 1963. Veteran of U.S. Coast Guard. A native resident of the Boston area.

(*l*) Richard J. Tibak, art director since 1958. For 6 years television graphic designer with National Broadcasting Co. in New York. Resigned to join WHDH–TV as art director. Recipient of 23 art awards while on WHDH–TV staff. A Boston area resident.

(*m*) Harry Wheeler, local sales manager since 1960. A member of the Massachusetts Bar. Admitted in 1933, practicing attorney until 1939, and a member of the Federal Bar. Entered broadcasting with Time Sales Department, Boston station WORL in 1939. Former New England representative for Ziv Television programs; and from 1954 until 1960 owner of his own company of radio and television station representatives. A native resident of the Boston area.

(*n*) Kenneth H. Wilson, music director of WHDH–TV and Radio. Joined WHDH 1931. A performer and composer, he has performed more than 75,000 programs on WHDH–Radio and WHDH–TV. U.S. Marine Corps veteran. A native resident of the Boston area.

144. WHDH–TV staff talent mentioned in programs described below are:

(*a*) Frank Avruch, a member of the regular talent staff. Joined WHDH–AM–FM as a summer replacement (temporary) announcer in 1956. Appears daily as "Bozo The Clown," also as host interviewer on arts and the theater on Dateline Boston. Two-year U.S. Army veteran. A native resident of the Boston area.

(*b*) Jim Britt, free-lance talent staff. Joined WHDH in 1958. Host-narrator of Candlepin Bowling Stars and Winning Pins. Former play-by-play announcer Boston Red Sox, Boston Braves, and Cleveland Indians. Play-by-play commentator for five baseball world series, including first world series televised coast-to-coast. Former lieutenant commander, U.S. Navy Air Intelligence. A Boston resident.

(*c*) Robert Cottle, free-lance talent staff. Joined WHDH in 1957. Host of The Captain Bob Show. Chosen after competitive auditions by a cross section of 30 children varying in ages, education, religion, and environment. Selected in 1962 by NBC–TV for weekly network children's program. Former captain, U.S. Army Air Corps. A native resident of the Boston area.

(*d*) Jean Harrington, free-lance talent staff. Joined WHDH 1958. Teacher of Romper Room. Graduated from Salem, Mass., State Teachers College; former teacher in Lynnfield, Mass., Junior High School. Selected in competition with more than 500 applicants as Romper Room teacher. A native resident of the Boston area.

145. WHDH personnel, as of January 1, 1964, were assigned by department as follows:

Department	Television exclusively	Combined television and radio	Radio exclusively	Totals
Technical	43	2	19	64
Program	63	32	13	108
Commercial	3	13	2	18
General administration		37		37
Total	109	84	34	227

146. *Plant and Facilities.* WHDH proposes an extensive, detailed finding on its studio and transmitting facilities, but it would unnecessarily add to this long initial decision to describe them as suggested. It is sufficient to say that they are of excellent design and quality for

the production and transmission of network and local programs, in black-and-white or color, studio-produced or remote. (Practically all local studio originations are in color.) In its first full year on the air WHDH originated over 50 remotes, nearly double this figure the second year, and in the following years well over 100 remotes each year. WHDH camera units have operated abroad on frequent assignments for production of channel 5 programs, and news photographers range throughout the region of the station. The station has a scenic design department of four men, headed, as above noted, by Mr. Lion. Ford, Polaroid, American Tobacco, and Golden Books are a few of the network advertisers who have come to WHDH–TV for the production of color television commercials. To decrease the possibility of extended service interruptions, applicant has provided dual equipment in key areas and patching facilities, and undertaken preventive maintenance.

147. On October 14, 1961, WGBH–TV, Boston's educational television station (channel 2), suffered a disastrous fire. Through heroic efforts of one of its employees, some important videotapes were saved from the fire. Other than these and a remote unit vehicle, channel 2's entire operation was destroyed. In this emergency period, Gregory C. Harney, television production manager at WGBH–TV, told Sidney Pike of WHDH that he was afraid that WGBH–TV would lose one of its main sources of income. This was a contract calling for production of certain programs for National Educational Television, including Science Reporter and Hearing Music. Mr. Harney said that if the series was not able to continue in production for national distribution, WGBH–TV would forfeit the contract. Mr. McGrath authorized Mr. Pike to provide studio space, equipment and manpower to maintain the scheduled programs that were to be produced for National Educational Television. These programs were complicated and large in scope and tied up an entire studio for a whole day. They required three cameras, and since each WHDH studio contains only two color cameras, it was not possible to use a third without eliminating WHDH operation. WHDH provided three black-and-white cameras from its remote truck exclusively for WGBH–TV's use. Special permission was granted by the engineers' union so that the cameras could be operated by personnel from WGBH–TV. WHDH–TV furnished a complete control room crew, consisting of a technical director, video man, and audio man. Nearly the whole technical crew was assigned on overtime, because WHDH was seriously taxed to keep its own operation, as well as WGBH–TV's, going. Storage space was made available for scenery. Whenever needed, the WHDH scenic department lent complete assistance. A completely furnished client's room was assigned to WGBH–TV, so that its personnel could work in privacy and have their own office. A sign with WGBH–TV's call letters was placed on the door, and this room was reserved for it whenever its staff worked at WHDH. There was special juggling of tape machines, projection equipment, and other facilities to accommodate the channel 2 staff members for screenings and editing preparation for their programs. So far as Mr. Pike knows, WHDH–TV was the only commercial station providing this complete studio and technical assistance. Requests were made for special use of WHDH–TV's chrome key system.

WHDH's schedule was arranged so that none of these requests were refused. In addition, WHDH–TV supplied its remote truck for a series of special remotes by WGBH–TV. Three WHDH men went with the truck. They included a videotape man, projectionist, and a remote truck supervisor. These men, too, were working on overtime. Regular engineering time ran 1,190 additional hours, plus the time of a vacation relief engineer who remained on the WHDH–TV staff from November 1961, to June 1962, for WGBH–TV. Also during this period, WHDH–TV incurred 293 hours of engineering overtime. These costs were borne entirely by WHDH–TV. While WHDH–TV was assisting WGBH–TV in maintaining its National Educational Television schedule, the educational channel was attempting to replace its remote unit cameras destroyed in the fire. In early December 1961, the new cameras were received by WGBH–TV. WHDH began, on December 9, 1961, the third and final stage of its assistance program, after a meeting of Hartford N. Gunn, Jr., general manager of WGBH–TV; Gregory C. Harney; William B. McGrath; Leslie G. Arries, Jr.; Philip Baldwin, chief engineer for WHDH–TV; George St. Andre, TV studio supervisor of WHDH–TV; and Sidney Pike. At this meeting, Mr. Gunn asked that WHDH–TV continue assistance until temporary studios could be set up at Morse Auditorium in the Museum of Science, Boston. Mr. McGrath offered to Mr. Gunn WHDH–TV's complete cooperation and facilities until WGBH–TV was ready to move to its temporary studios. In this third stage of assistance, WHDH studios and lights were used mostly on weekends, and the cameras, mobile unit, and personnel were provided by WGBH–TV. A regular schedule was set up for complete videotaping on Saturdays and Sundays, as well as Friday evenings. To maintain a liaison in technical assistance, the extra engineer was continued.

148. *WHDH–TV's programing.* WHDH–TV has been a network affiliate since it went on the air on November 26, 1957. Its primary affiliation from then until January 1, 1961, was ABC, though it also carried CBS and NBC. WHDH–TV has continued the policy of carrying programs of other networks, though in January 1961, it changed its primary affiliation to CBS. All local studio originations are in color, now over 5 hours a day. Besides local color originations and CBS color programs, WHDH–TV has carried some 10 hours of NBC color programing not carried by NBC's Boston affiliate. WHDH–TV has also produced color film programs. Programs produced by WHDH–TV have been carried on many other TV stations.

149. It is WHDH–TV's practice to train and rehearse area community groups who appear on the station. Many New Englanders have appeared on daily programs like "The Morning Key Club," "The New England Farm and Food Program," "We Believe," "Dateline Boston," and "Channel 5 Reports."

150. WHDH–TV has tried to develop local talent and to encourage new careers for talented local performers. The station has attracted individual performers as well as persons with new ideas for television programs. The talent has been both professional and amateur, the program ideas both commercial and of a community-"public service" nature. "The Morning Key Club," a Monday–Friday feature since

1961, averages more than two new singers, dancers or models every week. Talented new performers have been given their own programs, one for about a year. "Youth on Parade," originally a monthly program within the "Dateline Boston" series, a weekly program since February 1962, has presented about 1,250 young New Englanders from four New England States and from more than 75 cities and towns in Massachusetts alone. "Dateline Boston" has featured local performing talent, and has also developed and used local talent in writing, scenic design, costume design, and directing. Local guests are regularly seen on WHDH–TV women's programs, bringing their observations and experiences on subjects as diverse as cooking and book reviews.

151. WHDH–TV tries to use care in its selection of children's programs to insure wholesome content of fun and educational values, without violence and overdone slapstick. Mr. Cottle, the Captain Bob of the "Captain Bob Show," was a commercial artist for 16 years with a Boston newspaper. He uses drawings and puppets to entertain and inform children. He has composed songs and designed toys for the show. Two favorites on the program are Mr. Answer, a talking question box; and a drawing lesson. There are contests for children and participation by children in the program itself. The program makes camera visits to famous scenes like the berth of the Constitution. Another children's program, "Romper Room," is a package program owned by the Claster Organization, Baltimore, with a local teacher in each station over which the program appears. The management of WHDH–TV selected "Romper Room" because of its belief that care was taken under professional guidance in the development of its format, and that Claster would try to keep it informed of advancing knowledge in the education and handling of children. The station welcomed the opportunity to use local youngsters in a live program like "Romper Room." It felt that a competent teacher was vital to the program's success; as above noted, Jean Harrington was selected from 500 applicants. She attempts to create an education is fun ambience, to help children in self-expression, creative thinking, muscular coordination, and group adjustment. There are also health and safety education features on the program. "Bozo the Clown" is an early evening children's entertainment program, with Frank Avruch as Bozo. With the move to its present studios, WHDH–TV was able to increase the studio audience from 20 to 100, and to include elephants and high-wire and other circus acts in the program, though the circus acts were later dropped in favor of regular performers. The program demands careful planning and production. Bozo's brother, Nozo, is his stand-in, and when Mr. Avruch was out for 4 months in 1962 with a broken hip Nozo took his place. "Commander Jet," the newest WHDH–TV children's program, started out as purely entertainment, but it has developed to demonstration of basic space-age scientific principles. It includes a science quiz, with participating children being questioned and judged by their school's science teacher. Certain "Dateline Boston" programs (see below) are designed to have a special appeal for children, including programs on music, art, history, science, literature, sports, and the dance. WHDH–TV has tried to develop programs for particular age groups, as "Romper Room," 3–5; "Captain Bob" and "Bozo the Clown," 4–12; and "Commander Jet," 10–13.

152. WHDH–TV has broadcast a 15-minute, midmorning, weekday religious program series, "We Believe," almost without interruption since the station began operation in November 1957. The program, in inception and production, resulted from discussion and continuing association with the Radio-Television Apostolate of the Archdiocese of Boston (Roman Catholic), the Massachusetts Council of Churches (Protestant), the Massachusetts Board of Rabbis, and other prominent persons in the community's religious life. The weekly Sunday morning religious series for children, "Ring Around Sunday," is offered in association with the Massachusetts Council of Churches; its format has been adopted by the Connecticut and the Rhode Island Councils of Churches. In March 1962, WHDH–TV received from the Massachusetts Council of Churches the Chester Cameron Stewart Award for "creative cooperation and placement in the broadcast spectrum [!] of programs within the scope and interest of the Massachusetts Council of Churches." Since 1958 the station, together with the Massachusetts Board of Rabbis and the Jewish Chautauqua Society, has arranged for the broadcast of special film programs about the better-known Jewish holidays. Regular filmed religious program series have been carried in association with the Seventh Day Adventists; the Massachusetts Council of Churches; the First Church of Christ, Scientist; the Salvation Army; the American Baptist Convention; the Third Order of St. Francis; the Society of Jesus; and the Paulist Fathers. The station has also arranged for many special religious programs, local and network, including a solemn pontifical midnight mass at the Cathedral of the Holy Cross, Boston, celebrated by Cardinal Cushing, a color film produced by the Boston Archdiocese; a documentary film on the life of Pope Pius XII, a filmed report on the Vatican Consistory and the elevation of Archbishop Cushing to the Cardinalate; a rebroadcast of an ABC network program covering the installation of the Reverend Arthur Carl Lichtenberger as presiding bishop of the Protestant Episcopal Church of America; a film, "Power of the Resurrection," an Easter program presented with the Massachusetts and National Council of Churches; Eccumenical Service of the Massachusetts Council of Churches, live remote from Trinity Church, Boston, the Reverend Reinhold Niebuhr, speaker; two filmed dramatic programs from the series, "The Rabbi," produced by several Jewish organizations; and broadcasts of the General Conference of the Church of Jesus Christ of Latter Day Saints from Salt Lake City. It is the station's policy not to sell time for religious programs, but to make it available without charge to representative faiths in the community. The programs mentioned in this paragraph were all sustaining.

153. A continuing public service series of 25-minute programs produced in association with the Massachusetts Department of Education, entitled "Dateline Boston," has been carried by WHDH–TV daily Monday through Friday, 6–6:30 p.m., since the station first went on the air. More than 200 different community organizations and institutions have participated in the program in the past 6 years. A special series called "Spectrum" was presented in association with the Massachusetts Department of Education weekly from June 17, 1962, to August 4,

1963. "Dateline Boston" programs from January 1, 1961, to October 30, 1963, included, among others, 21 programs dealing with community and civic affairs; 41 with youth groups and interests; 47 with outdoor recreation and natural resources (43 with the cooperation of the Massachusetts Division of Fish and Game); 18 with military and local security services; 123 with music; 50 with art; 28 with theatre arts; 126 with history; 40 with science; 102 with adult education groups and miscellaneous subjects; 12 with the New England Conservatory of Music; five with Boston College; 20 with Boston University; 17 with the YMCA and YWCA; 10 with Massachusetts Community Colleges; six with Brandeis University; six with the University of Massachusetts; four with the Children's Museum; and 20 with the Franklin Park Zoo. From 1957 to 1960, "Dateline Boston," in addition to a variety of other programs, devoted 66 programs to drama, 61 to health, 78 to science, four to interracial subjects, and 11 to urban renewal. Every new community group appearing on "Dateline Boston" requires special care and training. Besides generally informing participants of production techniques, program formats and the use of props and visual aids, the station on March 25, 1963, conducted a "Public Service Seminar" designed to help groups prepare material for radio and television. One hundred and sixty-seven representatives of 109 New England organizations attended an all-day session for instruction in radio and television techniques, and discussion of program ideas, ways of work, and production problems, with WHDH personnel as instructors.

154. WHDH classifies "Dateline Boston" as educational, for renewal purposes because the Massachusetts Department of Education purportedly cooperates in its production, individual colleges have participated, and it includes adult education. While the department of education endorses the entire "Dateline Boston" series and from time to time furnishes advice or guidance on material to be included, it has not actually produced any of the programs. Mr. Day could recall no programs for which department personnel wrote the script. Department personnel do not regularly participate in the development of program series. No script submitted to the department has been changed and it has made no suggestions about any script (though it has made program suggestions). There have been occasional meetings with department members. Without passing judgment on the value of particular programs in "Dateline Boston," it appears that most of them cannot be described as educational within the Commission's definition. Indeed, in the WHDH logs "Dateline Boston" was classified as entertainment until shortly before Mr. Day testified on February 1, 1965. He and Mr. Levine changed the classification to educational because the classifications were in our judgment not accurate (tr. 15824). Mr. Akerson accepted the classification temporarily pending consultation with counsel as to how the thing should be properly done in the long run. By that I mean my own feeling is that my experience with "Dateline Boston" is that it can vary so much that perhaps it ought to be classified differently on any 1 day rather than a blanket classification (tr. 17306).

155. WHDH–TV tries to provide the community with both factual information and balanced discussion on matters of significant public interest. It has never editorialized, however. WHDH–TV public affairs programs include actual telecasts of governmental affairs, coverage of elections, film documentaries, panel discussions, debates, and interviews. The programs have included the first committee hearings of the Massachusetts Legislature ever televised; continuous coverage of State and national elections; and a variety of other subjects, including 68 programs varying in length from 30 minutes to more than 4 hours that were carried by the station from 1958 to 1963. Except for "Channel 5 Reports," no regular series of public affairs programs (this does not include specially scheduled programs) were carried between 6 and 11 p.m. "Channel 5 Reports" was presented every fourth Thursday at 10:30 p.m. from January 1961 to October 1962. Then the monthly time period was changed to Wednesday at 8 p.m. In 1963 the program was carried only occasionally, until the fall, when it was returned to the regular schedule on an expanded basis averaging two telecasts a month on Sundays at 12 noon. The following policy statement with respect to the discussion of public controversy issues is in radio and television applications previously submitted to the Commission:

> WHDH will continue its policy of presenting fully and fairly all aspects of public controversial questions of importance or interest to the station's listeners. The program format for handling public controversial questions will be such as to provide the most effective, informative and interesting presentation of the particular controversy. Consequently, it will differ in some respects from case to case. For the large number of questions which lend themselves to treatment by forum or roundtable discussion, the station will arrange forum and roundtable programs. The speakers on such programs will be selected on the basis of their background and ability to discuss the questions involved, as well as their prestige and reputation. In many cases the speakers will probably be persons actively interested in the controversy. In others, they will be persons whose standing and background particularly qualify them to present the questions without regard to the fact that they themselves are not participating in the controversy. In some cases, talks by persons representing opposite points of view may be scheduled in periods reasonably close to each other, if such presentations seem likely to result in better informing the station's audience. The station has no fixed policy with respect to whether or not time will be sold for discussion of controversial questions. The criterion which will determine whether or not in a particular case time will be sold will be whether or not the sale of time will in any way impair the station's ability to discharge its responsibility to present fairly and adequately all sides of the question. Should the factor of selling time in a given case present any obstacle to the full presentation of the question, time will not be sold, but the matter will be presented as part of the station's sustaining public service.

It was conceded in testimony, however, that the station has not carried discussion programs on some important controversial matters of local interest.

156. Generally, it is station policy both to sell time and to make time available without charge to candidates for public office. The disposition of individual requests for political time depends on such individual factors as the applicability of section 315 and public service responsibility. The station does not have an inflexible policy which requires either the granting or denial of every request by or in behalf of political candidates to sell time or to provide time without charge.

Its disposition of each request is based upon an appraisal of the circumstances. In 1964 free time totaled 165 minutes—30 primary and 135 general elections. During these same campaigns, 750 minutes of time and 62 spot announcements were sold. Network time is not included in these figures. While no general limitations are imposed with respect to political program or spot announcement length or frequency, the station would not provide so much time for any one candidate as to preclude its affording equal opportunity for political broadcast time to other candidates for the same office, or so much as to permit a disproportionate emphasis upon any particular office. Generally, it is the policy of the station to accept political advertising for broadcast for a period of 30 days before the date of local, State, or national primary and general elections at times when their scheduling is consistent both with the public interest and good programing practices.

157. Agricultural programing on WHDH–TV is under the direction of Joe Kelly, who has been associated with agricultural broadcasting since he first joined WHDH-radio in 1945. Under him the "New England Farm and Food Program" has been a daily feature Monday through Friday, since the television station began operation. Originally of 15-minute duration, the "New England Farm and Food Program" was expanded to 30 minutes. Among those participating regularly in the program are: Cooperative Extension Services (county) of the University of Massachusetts (weekly); members of the faculty of the University of Massachusetts (weekly); the Massachusetts Department of Agriculture (weekly); the New England Dairy and Food Council (semimonthly); and the Massachusetts Nurserymen's Association (semimonthly). Many other groups occasionally appear on the program, like the 4–H (four times a year). The program tries to furnish the community with information regarding the farmer's products and problems which directly affect and are of interest to the consumer.

158. Like "Dateline Boston," "New England Farm and Food Program" is under the general supervision of Mr. Day. Previously classified as entertainment, at perhaps the same time as "Dateline Boston" was reclassified, "New England Farm and Food Program" was classified as agricultural, on the general basis of the information that Mr. Kelly includes in the program, the general nature of the guests and the agencies they represent who participate in the program (tr. 16054). The host, Mr. Kelly, takes about 2 to 3 minutes to give the best food buys, market reports, consumer information, retail prices, and some information on wholesale prices, but Mr. Day could not recall whether this segment of the program is included more often than once a week. The remainder of the program features live musical numbers and an interview, presentation, or combination of the two, by Mr. Kelly and his guests. Sometimes there is an additional interview. The musical talent is generally professional; this portion of the program normally takes from 7 to 8 minutes. Again without evaluating particular programs, it seems that many of the topics discussed and persons and organizations appearing on the program have no ostensible relation to agriculture. In reclassifying the entire program, Mr. Day did not consider the nature of the interview or the identity of the guest in any particular program

159. Two hours and 35 minutes (about 15 percent of the WHDH–TV broadcast day) consist of 11 daily newscasts, seven of which (totaling 1 hour and 25 minutes) are locally produced. On Saturday it broadcasts two half-hour news programs, at 7 and 11 p.m., and on Sunday one at 11 p.m. Half of the Sunday news program is from CBS. There is also a 5-minute news program at signoff on Saturday and Sunday nights. It is the policy of the station to interrupt other scheduled programing to broadcast news developments of unusual public importance and interest. In 1962, WHDH–TV became the first Boston television station to present a late evening half-hour of news, weather and sports each night except Sunday. WHDH–TV encouraged CBS–TV to create expanded news programs and cleared time for a CBS–TV half-hour news program in midmorning and another in early evening when they became available. On labor Day 1963, WHDH–TV became the first Boston television station to present what amounts to a full hour of news and related information in the early evening. This expansion meant not only the coverage of more stories but more coverage in greater depth and detail, especially of significant stories. In 6 years of operation WHDH–TV doubled its news coverage and news preparation staff to its present complement of a news director, five full-time news photographers, five full-time news editors, and one part-time news editor. The 1963 news schedule represents the WHDH–TV news quantity peak. The total of daily (Monday–Friday) newscasts beginning in 1957 and running through 1960 was six, except in 1959 when it dropped to five. In 1961 it rose to 10, and in 1963 to 11. Locally produced news periods totaled four until 1960, when they increased to seven. Daily newscast time ranged from 60 to 85 minutes through 1961; in 1962 it rose to 1 hour 40 minutes, and in 1963 to 2 hours 35 minutes; locally produced newscasts totaled from 45 minutes to an hour through 1961, 1¼ hours in 1962, and 1 hour 25 minutes in 1963. News percentage increased between 1962 and 1963 from 5.4 to 8.9 to 15 percent. During the composite week it was 5.5 percent. WHDH–TV uses more than 50,000 feet of news film each month in covering local news. WHDH–TV was the first Boston television station to use a sound-on-film camera in daily news coverage and the first to assign a staff of newsmen to work daily with a sound-on-film crew. It maintains a fleet of four radio-dispatched news cars, each equipped with a dual electrical system designed by the WHDH–TV News Department. The station pioneered in the use of mobile radio equipment in television news cars in Boston and designed custom-built radio receiving equipment for receiving police and fire communications. It has written permission from the Boston Police Department, the Boston Fire Department, the Metropolitan District Police Department, and the Massachusetts State Police to monitor their broadcasts. WHDH–TV news also has leased two helicopters for the coverage of special news events, both of which are radio equipped for two-way communication with the station (Skyway Patrol).

160. In 1961–62, WHDH–TV, with the cooperation of UNICEF officials, sent Mrs. Bartlett, Mr. Avruch, and two cameramen to seven Asian countries and produced 11 programs to aid this international

youth agency. Thirty thousand feet of color and black and white film were taken during the trip. The half-hour films, telling the story of UNICEF's work in Asia to a children's audience, were first shown on WHDH–TV, and are now in worldwide distribution under the auspices of UNICEF. A 15-minute version of one color film was prepared for NBC–TV for color television presentation on closed circuit at the New York World's Fair. On May 4, 1962, at the United Nations, the United States Committee for UNICEF presented to WHDH–TV a "Special Citation, to a Friend of UNICEF for Outstanding Service to the Cause We Represent." This was the first such award ever presented to a television station and the fourth citation ever presented by UNICEF. Plans were underway in March 1964, to make a 15-minute version of the film, "Bozo's Adventures in Asia," to be made available for distribution in addition to the present half-hour film, to fill requests from school assembly committees and TV stations.

161. Sidney Pike, television production manager of WHDH–TV, originated an exchange of programs with a television station in Sao Paulo, Brazil, to strengthen good relations with Latin America. Mr. Pike and his cousin, Alvaro Moya, program director of channel 9 in Sao Paulo, worked out a format for a series of programs which would, in effect, consist of letters to each other. The WHDH productions would be videotaped programs showing various aspects of life in the United States. WHDH–TV produced a series of programs on "The American Way Of Life." They dealt with life in a project development in this country; primary and secondary schooling in Framingham, Mass.; college education; an actual incident in which people of a slum clearance housing project helped get legislation adopted to better their living conditions; and labor and management, as reflected in an average factory worker's activities in Lowell, Mass., showing the U.S. Government's program to rehabilitate industrial workers put out of work by automation or by lack of employment in depressed areas. These and other programs (a sports program was shown in Sao Paulo and Rio de Janeiro, and two American way of life programs in Sao Paulo and Recife) were carried in Sao Paulo. They were a message from the mayor of the city of Boston to the people of Sao Paulo, an interview with Harry Belafonte on the Negro and his life in the United States; "Dateline Boston," Massachusetts fish and wildlife and aquarium programs, chosen because of visual appeal and absence of dialogue; two jazz programs, one by the Dave Brubeck group and the other Jimmy Rushing; and a special sports program of the "Boston Celtics vs. Los Angeles Lakers Basketball Championship Game," 1962. WHDH also televised programs in Boston dealing with Brazil. For example, former President Kubitschek of Brazil was interviewed on "Channel 5 Reports" by Leo Egan, Prof. William Sprague Barnes, and Dr. Thomas Skidmore, on Brazilian problems and the relationship between Brazil and the United States. WHDH–TV, however, has carried no programs produced in Brazil.

162. The WHDH–TV Promotion Department publicizes its programs in purchased periodical advertising; in on-the-air promotional broadcasts over the station itself; through press conferences, direct

mail, and program press preview screenings; and by other normal methods. Public service as well as commercial programs are promoted. "Dateline Boston," for example, is, except for news programs, the most heavily promoted of all WHDH–TV programs. "Dateline Boston" is advertised to attract a large audience, of course, but also to make community groups aware that they can participate in the program. In evidence are illustrative reprints of double-truck and full-page ads on WHDH–TV public service programs in The Boston Globe and Boston Herald-Traveler, and of full-page ads in Broadcasting magazine. The station maintains an educational mailing list, to notify educators in the coverage area of programs of unusual interest to students. Nearly 1,000 high school, junior high school, and parochial school principals are on the list; specialized program information is regularly mailed to them. WHDH–TV personnel speak to community groups—Rotary, Kiwanis, and PTA. The station, in cooperation with the other two Boston commercial television stations, in fall, winter, and spring publishes a monthly booklet listing their programs, called "457." Its aim is to call the attention of community leaders to programs of particular interest.

163. One of the projects undertaken by the producers of "Dateline Boston" was the "Green Roots" series of programs, which grew out of local Boston interest in President Kennedy's visit to Europe in the spring of 1963. This suggested a program going back to the first great wave of Irish emigration to Boston. It was decided to deal with the relationship between Boston and Ireland. Members of the Boston Irish community were consulted. Among them were Monsignor Walter Flaherty, of the Catholic TV Center; Monsignor Francis Lally, editor of "The Pilot"; Gearoid O. Clerigh, consul general for Ireland in Boston; Oscar Handlin, professor of history at Harvard and an authority on immigration; Joseph Gannon, past president of the Eire Society; George Ryan, dramatic critic of "The Pilot" and an active member of the Eire Society; Father Gerard Smith, of the Columban Fathers, who has made several films in Ireland; Colm McMorrow, regional manager of Irish International Airlines; and Brendan Mallon, former reporter for The Irish Times and now publicist for several Irish organizations. Executive Producer Virginia Bartlett talked in New York with representatives of the Irish Tourist Board, the Irish Export Board, Shannon Free Airport Development Authority, and others. Mrs. Bartlett and two crew members went to Ireland to film the programs. They covered all the major cities in the Republic of Ireland (Dublin, Donegal, Galway, Limerick, Shannon, Cork, Wexford and Waterford), but concentrated on the west of Ireland, because most Irish emigrants to Boston came from there. About 8,000 feet of film were shot, resulting in four preplanned programs, and a fifth show on the arts and crafts of Ireland scheduled for televising in January 1964. The four originally-planned programs, "Ireland the Place," "Ireland the People," "The Boston Irish Then and Now," and "Christmas In Ireland," were carried on the station on December 5, 1963, December 12, 1963, December 19, 1963 and December 25, 1963. At the time the exhibits were exchanged sound tracks were being prepared for these films to make them available to interested groups in

the area. A feature of the trip to Ireland was an interview granted by President Eamon DeValera, who had refused to give interviews to the U.S. networks. There was also an interview with Lord Mayor Briscoe of Dublin, and with Prime Minister Sean Lemass, who had recently returned from a visit to Boston and other American cities.

164. WHDH–TV established a Program Advisory Committee in 1954. The committee has not been disbanded, meeting on the invitation of the station for consultation on public service programing; the staff also consults frequently with individual members on program matters in their special fields (see below in this paragraph). Its membership includes representatives of civic, charitable, religious, mercantile, agricultural, industrial, and educational groups. The basic organizational representation within the committee has remained the same, though there have been changes in personnel as groups named successor representatives. At the 1954 meeting of the program committee, Mr. McGrath told the group that it was planned that the committee meet at least twice a year and possibly once each quarter. After the 1954 meeting, however, the committee did not meet until October 31, 1958, several months after the court of appeals had remanded the first proceeding to the Commission for further hearings on ex parte contacts. (In its 1957 decision, 22 FCC at 810, the Commission said: "The committee is to function only in an advisory capacity, although it is planned that it would meet on a regular basis for the purpose of providing assistance through the exchange of viewpoints and ideas as to what needs in television might be supplied by WHDH. One such meeting had been held as of the time the hearing herein, but consultations are shown to have taken place with the committee and its members on an informal basis. The committee was consulted informally prior to the preparation of the typical week schedule as proposed in the WHDH application.") Between these meetings the entire program schedule, about which the committee had been consulted in 1954, was revised to accommodate the network, but the committee did not meet to discuss the changes, including changes in the few programs retained from the original program proposal. Three additional meetings have been held—in 1960, 1962, and 1964. They are more social than business in nature. They last from about noon to 2 or 2:30 p.m. Cocktails and lunch are served, and station personnel report on operations. Minutes of meetings since 1954 are not kept. Mr. Akerson, at least, has not checked to see whether committee suggestions have been carried out; and he did not instruct any staff member to keep a record of suggestions.

165. The 15-minute morning weekday religious program, "Believe", which has been broadcast since November 1957, followed discussion with committee members and other community religious leaders. Other programs have been carried on the suggestion of community leaders. One series of programs came out of a suggestion by Dr. Edwin P. Booth, Professor Emeritus of Historical Theology at Boston University, a Civil War buff. A narrative of the war, it was carried monthly on "Dateline Boston" from July 1961, coinciding with the 4-year centennial celebration of the Civil War. As national interest in the civil rights struggle increased, Dr. Booth, who narrated the program, re-

minded viewers of the sacrifices made by Americans a hundred years ago in facing the question. A special hour-long videotaped program called "For Us The Living," on the Battle of Gettysburg, was produced as part of the series. WHDH–TV sent a production unit to Gettysburg for 5 days; it shot 2,000 feet of color film, as well as still pictures. The program was broadcast on July 4, 1963, the 100th anniversary of the battle. The station has begun talks with Mrs. Muriel Snowdon, a Boston Negro leader, hoping to formulate a series of programs for "Dateline Boston" which will examine the status and aspirations of the Negro in Boston and the impact upon the community of current and anticipated developments in civil rights. In the spring and fall of 1963, on "Dateline Boston," the station broadcast a series of eight programs on consumer practices and education. The series was suggested by Dean Marjorie Niederprum of the School of Home Economics of the University of Massachusetts, and Miss Marjorie Merchant and Miss Virginia Davis, faculty members.

166. WHDH–TV subscribes to the Television Code of the National Association of Broadcasters. Applicant is also a member of the Boston Better Business Bureau. All live commercial copy and films are reviewed upon receipt. George Watson, Jr., who has been with WHDH since 1940, is responsible for clearing this material. Advertising claims and prize contests are checked. If Mr. Watson has doubts about any advertising which he cannot resolve, he refers them to the station's Conference Committee on Commercial Copy, consisting of Alexander Tanger, John Day, Leslie G. Arries, Jr., and either Harry Wheeler, the local sales manager, or David Abbott, the national sales manager, or both. Mr. Wheeler, who is a member of the Massachusetts Bar can help on legal questions. If a new policy decision is involved, the matter is referred for final decision, with a committee recommendation, to Mr. McGrath. Occasionally, Washington counsel is consulted on such matters as sponsor identification.

167. The station operates about 136¾ hours a week. It shows the following composite week program type breakdown in its renewal application filed October 26, 1962:

	Percent
Entertainment	68.1
Religious	3.6
Agricultural	1.9
Educational	5.5
News	5.5
Discussion	2.2
Talks	8.9
Play-by-play sports	4.3
Total	100.0

A composite week source analysis in the same document shows:

Program log analysis

[In percentages]

	8 a.m. to 6 p.m.	6 to 11 p.m.	All other hours	Total
(1) Network commercial (NC)	53.02	75.00	26.90	52.58
(2) Network sustaining (NS)	5.55		17.93	7.01
(3) Recorded commercial (RC)	11.76	13.57	11.80	12.23
(4) Recorded sustaining (RS)	4.29	0.72	16.15	6.13
(5) Wire commercial (WC)				
(6) Wire sustaining (WS)				
(7) Live commercial (LC)	18.64	4.76	14.95	14.23
(8) Live sustaining (LS)	6.74	5.95	12.27	7.82
(9) Total commercial (1), (3), (5), (7)	83.42	93.33	53.65	79.04
(10) Total sustaining (2), (4), (6), (8)	16.58	6.67	46.35	20.96
(11) Complete total (percent)	100	100	100	100
(12) Actual broadcast hours (per week)	70.00	35.00	31.47	136.47
(13) Number of spot announcements (SA) (per week)	411	183	175	769
(14) Number of noncommercial spot announcements (NCSA) (per week)	123	22	43	188

Proposed operation is expected to show similar percentages, and future programing to be similar to the past. It should be noted, however, that the figures shown on the renewal application for SA and NCSA were revised upward in Mr. Day's testimony, based on his study after the renewal application was filed. According to him, 782 SA's and 192 NCSA's were broadcast during the composite week; but the actual number of SA's broadcast is higher because the station does not classify some stay tuned announcements as SA's.

168. For some years WHDH–TV has regularly telecast games of the Boston Red Sox. The baseball telecasts are originated by WHDH–TV and are made available to other New England stations, as apparently are some other sports programs originated by WHDH–TV, on a simultaneous basis. The only CBS network programs which the station has originated have been baseball. All baseball telecasts for the season are scheduled in advance; WHDH–TV broadcasts about 55 games a season. Mr. McGrath could recall no instance when a baseball telecast had been preempted, but he added that "this does not mean there may not have been one" (tr. 15771). On one occasion the station carried a baseball game instead of a simultaneous speech at Boston College by President Kennedy; the game had been scheduled before it was known that the speech would be available. In 1961, on 7 different days, WHDH–TV carried baseball games instead of the usually scheduled CBS sustaining discussion program, "Accent." On three other occasions, when baseball games ran longer than normally (only one was a regularly scheduled Red Sox game at New York the others being ABC National League playoff games between Milwaukee and Los Angeles, on September 28 and 29, 1959) the baseball telecasts were continued and the heavily-promoted "Dateline Boston" was preempted. The preempted programs were not inserted in the schedule for later broadcast.

169. *Robert B. Choate.* Mr. Choate, president of WHDH and chair-

man of the board of The Herald-Traveler Corp., died on December 21, 1963. He had taken no part in WHDH affairs from November 1, 1963. Mr. Choate had been associated with The Herald-Traveler Corp. for more than 40 years; he had been editor and publisher of the Herald, president, vice president, director and a substantial stockholder in the corporation. He had been president and a director of WHDH, Inc. since it entered broadcasting in 1946, and kept the Herald-Traveler Board of Directors informed of broadcast operations. Mr. Choate's functions in this area are summed up in the following paragraph from the Commission's findings in its decision released April 25, 1957 (13 R.R. at 518):

> Mr. Choate is directly responsible to the board of directors of Herald-Traveler for the operation of WHDH–AM and FM. The general policy for the broadcast operations was established in 1946 and has been executed by Mr. Choate since that time. More specific policy decisions are made by Mr. Choate, in general agreement with the board of directors of Herald-Traveler. He reports to the board each month the stations' activities, informs the directors of contemplated board changes, and seeks their approval which is given without formal action. Mr. Choate testified that the board had never questioned any policy that he had laid down but has always agreed with him. As president of WHDH, Mr. Choate keeps in close touch with the programing, operation and financial responsibility of the station. As part of his managerial duties, he assumes the entire responsibility for the selection of personnel and the choice of programing. Under his supervision, as found hereinafter in paragraphs 19 and 20, the services of Mr. McGarth were engaged as general manager, and the facilities, programing and staff of WHDH were improved. Mr. Choate will continue to perform the same duties and responsibilities in the proposed television operation.

Mr. McGrath testified (tr. 15438) that Mr. Choate concerned himself chiefly with physical assets—buildings, property and equipment * * * the improvements, the progress of our engineering. I would say everything beyond the actual day-to-day operation of the physical staff of people * * *; that he was very much interested in finances; and that while he would discuss programing with Mr. McGrath, he considered that primarily Mr. McGrath's domain.

170. In the preliminary statement it was noted that the April 1957 decision, granting WHDH's application, had been appealed to the court of appeals; and that on July 31, 1958, the court (104 U.S. App. D.C. 226, 261 F. 2d 55, 17 R.R. 2083) had found no error in the comparative aspect of the case, but had remanded it to the Commission for further hearing on ex parte contacts. In its decision released July 14, 1960 (29 FCC 204, 20 R.R. 395), the Commission, on exceptions to the special hearing Examiner Stern's initial decision on the ex parte contacts, made the following findings on WHDH (20 R.R. at 399):

> 5. Originally this proceeding involved a comparison of the applications of WHDH, Inc.; Greater Boston Television Corp.; Massachusetts Bay Telecasters, and Post Publishing Co.[2] In the spring of 1954, shortly before the consolidation of the applications for hearing, Senator Saltonstall, at the behest of Robert B. Choate, director and vice-president of the Boston Herald-Traveler Corp., publisher and editor of the Boston Herald and Traveler newspapers and president of WHDH, Inc., wrote to the Chairman of the Commission stating that the Herald Traveler was concerned with the Commission's diversification policy[3] as it applied to newspapers, and asked that "all applicants be given a fair and equal opportunity." In the letter no preference for any of the applicants was urged.

[2] The applications of CBS and Post were dismissed prior to the release of the Commission's decision of Apr. 24, 1957.

[3] It is the Commission's policy to encourage the diversification of ownership of the media of mass communications, and the effect of a grant on such diversification is one factor in the evaluation of applicants competing for a facility.

6. On October 4, 1954, George C. McConnaughey commenced his service as Chairman of the Commission. The evidence in this proceeding is concerned in large part with certain conversations held with Mr. McConnaughey by officers of two of the applicant corporations. The examiner noted, as do we, certain minor discrepancies in the testimony of the witnesses as to details of the events which transpired. He, having an opportunity to observe the demeanor of the witnesses and to evaluate their testimony in the light of his wide judicial experience, expressed the view that all of them were "entirely honest and sincere," and reconciled their testimony into his findings of fact. Our examination of the cold record furnishes no cause to disturb the examiner's basic findings as to the honesty of the witnesses, and we attribute such discrepancies as appear to confusion as to the meaning of questions; to legitimate failure of exact recollection or to improper phraseology in spontaneous answers. However, as hereinafter noted, while we accept the honesty of the testimony so far as it went, we do not believe that all of the witnesses disclosed fully their actions and motives.

7. In late 1954 or early 1955 Mr. Charles F. Mills, a friend of Choate who had previously served with McConnaughey on the Renegotiation Board, arranged a luncheon meeting for himself, Choate and McConnaughey, who had not theretofore met.[4] Choate told Mills that his purpose in attending this luncheon was to "size up" or form an impression of the new Chairman. At the luncheon, which took place at a Washington hotel, Choate identified himself as an applicant for a permit. Although there was no discussion of the *Boston* case which was then before the Commission's examiner for hearing, Choate asked how long comparative proceedings took, and what the general procedure was after an examiner made his ruling. Mr. McConnaughey did not recall having attended this luncheon.

8. In March or April of 1956 a second luncheon took place attended by McConnaughey, Choate, Mills and Thomas M. Joyce, a lawyer for the Herald-Traveler Corp. who did not, however, attend the luncheon in that capacity. This meeting was some 3 months after the release of the examiner's initial decision favoring Greater Boston and some 6 months prior to the oral argument on the exceptions to that initial decision. Choate requested the luncheon for the purpose of discussing legislation with Mr. McConnaughey, although prior to the meeting he did not specify what legislation he wished to discuss. At the luncheon there was no conversation on the merits of the *Channel 5* case as such, but Choate had in his possession a draft of the "Dempsey Amendment" [5] which he intended to present to Mr. McConnaughey in the hope of swaying the Chairman's opposition to the then pending Harris-Beamer bills. However, when Choate attempted to present the draft to McConnaughey the latter refused to accept it or to permit discussion of the matter. Therefore, only conversation of a social nature prevailed at the luncheon.

9. The only other encounters between Choate and McConnaughey have been at large social gatherings which both attended but not as members of the same party.[6] Although there is evidence of a series of telephone calls between Choate and Mills in January of 1956 (neither gentleman could recall the subject matter of those calls), and there is also some difference in the recollection of the witnesses as to the details of the luncheons they attended, we could not, on the basis of such evidence conclude as urged by certain of the parties that more than two luncheons occurred without basing such conclusion on mere speculation and conjecture.

171. Also as indicated in the preliminary statement, the Commission disagreed with Judge Stern on the conclusion to be drawn from these acts. It concluded that WHDH should be charged with a comparative demerit on the ground that Mr. Choate's two meetings with then chairman McConnaughey involved an attempt to influence the chairman outside the recognized processes of adjudication. The

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[5] At that time there was pending before the House subcommittee of the Committee on Interstate and Foreign Commerce the "Harris-Beamer" bills which would have limited the Commission in the application of its policy encouraging the diversification of the ownership of mass media of communication. Chairman McConnaughey had testified in opposition to the bills of William J. Dempsey, the Herald-Traveler's counsel had prepared the "Dempsey Amendment" designed to cure some of the defects objected to in McConnaughey's testimony. The diversification criterion was of patent comparative significance in the pending *Channel 5* case.

[6] Choate extended an invitation to McConnaughey to attend a gridiron dinner which Mr. McConnaughey ultimately declined.

WHDH grant was set aside, and WHDH put on special temporary authority (20 R.R. 395). After appeal and remand, the Commission affirmed its interpretation of the effect of Mr. Choate's conduct, as well as its preference for WHDH, but reinstated the WHDH channel 5 construction permit, though for 4 months only (24 R.R. 255, 261). The merits of the appeals filed from this decision have not yet been decided by the court of appeals (see, however, par. 2, above), which has remanded the case to the Commission for further proceedings because of Mr. Choate's death.

172. In its memorandum opinion and order of designation released October 29, 1963 (1 R.R. 2d 468, par. 9, above), the Commission said:

8. In its September 25, 1962, decision the Commission limited the duration of the license granted to WHDH to 4 months for the reasons stated therein. *In the Matter of WHDH, Inc.*, 24 R.R. 255, 33 FCC 449. Since the Commission determined in that proceeding that the ex parte conduct by Robert B. Choate should be treated only within the context of a comparative issue, similar treatment is accorded the matter in this proceeding, as encompassed in issue 1.

There is no evidence that members of the Herald-Traveler board, except Mr. Akerson, knew of any of Mr. Choate's meetings with chairman McConnaughey until some time in 1958, when testimony before the House Legislative Oversight Committee was carried in the newspapers. Before Mr. Choate's meeting with Mr. McConnaughey to discuss the "Dempsey amendment" (which counsel had prepared to cure some of the defects in diversification bills, pending before a House subcommittee, objected to by chairman McConnaughey in testimony to the subcommittee) Mr. Akerson knew it would take place. Mr. Choate had not asked Mr. Akerson's opinion of the propriety of this meeting, but told him that Mr. Dempsey said it was proper. Mr. Akerson did not question this; he felt that "if Mr. Dempsey says it is appropriate, it is good enough for me" (tr. 17917), and remains of this opinion. After the meetings between Mr. Choate and Mr. McConnaughey became a matter of public record, Mr. Choate made a statement of his position on the matter to the Herald-Traveler directors. Mr. Hall testified that "although no formal vote of confidence was taken, the expression from the people at the meeting was very clearly in favor of Mr. Choate's conduct" (tr. 14377). The directors of both the Herald-Traveler and WHDH reelected Mr. Choate as an officer of the corporations after the Commission's decision of July 14, 1960. In the present proceeding Mr. Akerson testified that, subject to checking with counsel, he still thought it appropriate to discuss legislation bearing on an issue in a hearing in which he was involved with a member of the Commission ex parte while the matter was pending before the Commission. Mr. Brown was satisfied that Mr. Choate had done nothing improper; he had accepted Mr. Choate's defense of his own conduct and his conviction that it was not reasonably open to adverse criticism, and he (Mr. Brown) had accordingly helped reelect Mr. Choate. When he helped reelect Mr. Choate, Mr. Hanify was familiar with the gist of Mr. Choate's testimony before the Commission, and even after the Commission's decision of July 14, 1960, he "thought the issue of the propriety of the conduct was then before the court and, as a lawyer, I would suspend my judgment until a judicial tribunal had passed on it" (tr. 20276).

173. On June 19, 1964, the WHDH, Inc., board of directors adopted a resolution reciting that the "board has not made any changes in the

policies governing the operation of WHDH, WHDH–FM or WHDH–TV by reason of the death of Mr. Robert B. Choate and, further, the board neither contemplates nor intends to make any such changes; and, in particular, with reference to representations in the application for renewal of license of WHDH–TV, filed October 26, 1962, the board reaffirms all the representations and commitments thereof." On the same day the Herald-Traveler board, noting the WHDH resolution, adopted a resolution to the same effect and "endorsed and approved" the WHDH resolution. It does not appear, however, that Messrs. Talmadge, Brown, Winslow, Hanify, or Hall had any specific knowledge of the WHDH policies. At the Commission's direction, on June 25, 1964, WHDH filed an amendment to its renewal application to reflect Mr. Choate's death and changes in offices which followed it. The amendment said in part:

> WHDH, Inc., reaffirms all of the representations and commitments contained in its application for renewal of its television license (file No. BRCT–530).

174. WHDH's offer of its exhibits 8, 9, 11, and 12 for identification was not pressed because counsel for all the parties entered into a stipulation, approved by the hearing examiner, as follows (tr. 11511):

> WHDH, Inc., having proffered its sworn exhibits marked 8, 9, 11, and 12 for identification, the parties by their respective counsel hereby stipulate that if witnesses thereto were called by WHDH, Inc., they would have testified to and adduced evidence of facts showing that no material changes occurred during the period November 1, 1963, through November 30, 1964 (during which period Mr. Choate took no part in the affairs of WHDH, Inc.) with respect to maintenance and improvement of technical facilities, operating policies and program operation of WHDH–TV, AM and FM, as the same are reflected in WHDH's exhibits 1 through 6, inclusive, and in its most recent application for renewal of licenses of WHDH–AM and WHDH–FM, and the facts in exhibits 1 through 6 and [the] AM and FM renewal applications may be taken as representative of the period November 1, 1963, through April 30, 1964, for the purpose of this proceeding.

(Pages 1 and 2 of exhibit 8 were admitted in evidence to clarify a reference in the stipulation to the 6-month period as one in which Mr. Choate took no part in the affairs of WHDH, Inc.)

175. In its step II proposed findings the Broadcast Bureau requests the hearing examiner "to note officially paragraphs 20, 27 and 73 of the conclusions in the Commission's decision of April 25, 1957 [22 FCC 767], paragraphs 4 and 8 of the conclusions of the Commission's decision of July 14, 1960 [29 FCC 204] and paragraphs 4, 13 and 16 of the Commission's decision of September 26, 1962 [33 FCC 449]." Official notice is taken and the cited extracts are reproduced in appendix A, below.

176. *Findings relating to Media Diversification.* It has already been noted that the Herald-Traveler publishes two daily newspapers, the Boston Herald (morning) and the Boston Traveler (evening), as well as the Boston Sunday Herald. In addition to these papers, there are five other newspapers published in Boston—the morning and evening Globe, the morning and evening Record American, and the Christian Science Monitor. None of these other newspapers has an ownership interest in an AM, FM, or TV station. WHDH–FM is one of 12 FM stations in Boston and its immediate vicinity. WHDH–AM is one of three 50 kw. stations, and eight other AM stations with power up to 5 kw. (three daytime only) in Boston and vicinity. Boston has three commercial VHF TV stations, including WHDH–TV, a UHF commercial and a VHF educational station.

177. Based on Audit Bureau of Circulation figures of March 31, 1964, the Herald-Traveler's average daily combined circulation was 336,639, or 23 percent of the Boston market. According to 1964 Media Records figures, the Herald published 19.3 percent of the total Boston daily a.m. and p.m. display lines, and the Traveler 26.1 percent, giving the two papers a total of 45.4 percent of the market. The corresponding figures for total paid lines are 17.7 percent for the Herald and 22.4 percent for the Traveler, a total of 50.1 percent of the market. On Sunday the Herald had 44.2 percent of total Sunday display lines and 38.9 percent of total paid lines. These figures give the Herald-Traveler first rank in display linage, morning, evening, and Sunday, and second in total paid linage. The Herald-Traveler newspapers employ about 1,600.

178. The Herald-Traveler newspaper operation contributes about 70 percent to the total net revenues of the consolidated operations. According to the Herald-Traveler 1964 annual report, newspaper advertising revenues in 1964 increased 3 percent. Many costs of operation have been sharply reduced and substantial economies effected; and the net profit per share of the corporation is at an all-time high. According to Mr. Akerson's letter to stockholders, dated December 18, 1964, he was looking forward to a further improvement in newspaper operations. Between Mr. Choate's death and March 1965, the quoted over-the-counter price of the stock rose considerably.

179. Entron, Inc., of Silver Spring, Md., is a manufacturer of equipment used in community antenna television systems and constructs and owns CATV systems. The 1964 annual report of Entron, published in May 1965, reads in part:

> For a number of years, Entron has sought out opportunities for ownership in CATV franchises, and since 1961 has acquired 50 percent or large interests in systems in Carlsbad, N. Mex.; Deboise, Pa.; Jacksonville, N.C.; and most recently in Sharon, Pa. These investments have greatly enhanced the potential of your holdings in Entron. Had financing been available your company could have capitalized on additional opportunities such as these.
>
> On April 21, 1965, pursuant to a unanimous vote of approval of your board of directors, Entron entered into a financing agreement with The Boston Herald-Traveler Corp. of Boston, Mass. Under the terms of the agreement, Entron will receive an immediate loan of $1,500,000, which will be applied to the reduction of all other borrowings, the retirement of convertible securities, and the increase in cash necessary to accommodate a substantial increase in sales volume. Additionally, Entron will be able to borrow a minimum of $4,500,000, and possibly $7,500,000 for investment in the acquisition of equity interests in CATV properties. In turn, The Boston Herald-Traveler Corp. will acquire a warrant, expiring May 3, 1975, to purchase shares of common stock outstanding on the date the warrant is exercised. The warrant is exercisable only in total and at a price equivalent to the book value of your company's shares outstanding at February 28, 1965. The agreement also provides that the total cost to the Boston Herald-Traveler Corp. shall not exceed $1,500,000 during the first 7 years of the term of the warrant and that such cost will increase by $142,826.50 per year in each of the remaining 3 years.
>
> Minimum borrowings of $6 million at 6 percent interest, to be provided under this agreement, are equivalent to approximately five times the net worth of the Entron stockholders' investment and will give Entron a magnificent opportunity to join with franchise holders in the ownership and development of CATV properties. These properties have, historically, generated high profits and excellent cash flows.

180. The warrant the Herald-Traveler acquired under this transaction entitled it to a 50-percent stock interest in Entron. By an amendment to its application, dated September 13, 1965, WHDH disclosed

that on August 16, 1965, the Herald-Traveler had exercised its warrant, and in addition had bought Entron shares in the open market, for a total of 299,415 shares, or 50.87 percent ownership. On August 16, 1965, Mr. Akerson and Mr. Clancy were elected to the Entron board of Directors and Mr. Akerson was appointed chairman of the board. Official notice may be taken of information in the Herald-Traveler annual report for 1965 that the Entron Board has 12 members; that Mr. Clancy is chairman of the executive committee; and that besides Mr. Akerson and Mr. Clancy the following six persons are members of the Entron Board of Directors: Charles A. Hart, WHDH assistant treasurer; William C. Koplovitz, of Washington, counsel to WHDH; Vincent Manno, Herald-Traveler consultant and advisor; Lawrence J. O'Connell, Herald-Traveler assistant business manager; Leon B. Ranger, Herald-Traveler assistant treasurer; and Roger P. Talmadge, Herald-Traveler and WHDH treasurer. In addition to the interests mentioned in the portion of its 1964 annual report quoted above, Entron now owns a 70-percent interest in a CATV system in Wilmington, N.C.

181. The Herald-Traveler continues its practice of accepting display and most classified advertising copy only on a combined rate basis for its two newspapers (See *Times-Picayune* v. *U.S.*, 345 U.S. 594, 614). The station continues to rely heavily for promotion on the papers. Although WHDH–TV advertises in the Globe, the Record American, and the Herald-Traveler, more than half of this advertising is carried in the Herald-Traveler. WHDH pays in cash or by check, through an advertising agency, for any advertising in the Herald or Traveler. Before WHDH–TV went on the air the AM station was identified as the "Herald-Traveler station"; for a time WHDH–TV broadcast that its news came from the Herald-Traveler. Both these practices, however, have been discontinued.

182. The Sunday Herald ran a lengthy news feature on the filing of WHDH–TV's renewal application. The following excerpts from the article are illustrative:

> The voluminous file of evidence reflecting the fulfillment of WHDH–TV's original programing philosophy contains much material recognizable by New Englanders as daily television fare on channel 5. What has become routine programing for WHDH–TV during the past 5 years becomes a unique record of responsible broadcasting upon perusal of the official station document [the renewal application].
>
> "Dateline Boston" has done, perhaps, more in its line than any other single program in the country.
>
> Also incorporated in the station's application is a full description of its physical facilities including physical and production units that are a constant source of interest and amazement to professional broadcasters who visit WHDH from all over the world.

The article was run as editorial matter, not as a paid advertisement. The Herald-Traveler gave no publicity to the renewal applications filed by the two other Boston commerical television stations or by the educational station.

183. Charles River and BBI propose adverse findings because of the Herald-Traveler's premature, unauthorized publication in the newspapers of a preliminary draft of a report of the Massachusetts Crime Commission. The emphasis each places on the matter differs. Charles River apparently feels that the Herald-Traveler violated its previously enunciated policy of informing the public as soon as possi-

ble, through either broadcast or newspaper, by withholding the broadcast of the report to protect the newspaper scoop. BBI stresses (1) the alleged unauthorized acquisition of the draft and (2) the fact that Mr. Akerson was told by Alfred Gardner, chairman of the crime commission, in an attempt to prevent publication of the draft, that the final report would differ from the draft which the Herald-Traveler had (among the differences was a deletion in the final report of a reference to the University of Massachusetts), yet Mr. Akerson went ahead with the publication. Whatever view is taken, however, it would be unprofitable to pursue this matter unduly to attempt to glean anything prejudicial to WHDH. (*a*) There is a question of journalistic evaluation—how to feature a story so that it makes the greatest possible impact. It would be beyond the hearing examiner's competence to assess any blame because the Herald-Traveler chose to disclose the draft, a printed document, in its natural medium, print, rather than perhaps weaken its effect by publicizing it orally. (*b*) As to BBI's accusations, here, also, the hearing examiner will not insert himself as a judge of journalistic enterprise. The Crime Commission, the body directly affected by the premature publication, did not try to stop it by injunction, nor afterwards institute legal proceedings to penalize the Herald-Traveler for its alleged surreptitious procurement of the draft. What the Crime Commission passed over should not furnish material for a definitive ruling in this proceeding. (*c*) Furthermore, it is difficult to understand the criticisms of WHDH's opponents who, on the one hand charge the Herald-Traveler with overeagerness in snatching a document before it was ready for delivery at full term, and, on the other, contend that the public welfare suffered because the Herald-Traveler thwarted instantaneous disclosure of the contents over the air.

184. Among other alleged journalistic derelictions, BBI accuses the Herald-Traveler of biased and tendentious reporting of the present proceedings, by discriminatorily publicizing its own claims against those of the competing applicants. It also charges the Herald-Traveler with "irresponsibility" in "publishing accounts of criminal proceedings." It cites criticisms of the Herald-Traveler by both State and Federal Courts because it published material which interfered with a fair trial for criminal defendants; and it mentions at least one contempt fine for this violation of a defendant's rights. Here is an area, however, in which the hearing examiner thinks it is both unwise and unrewarding to enter. As intimated above, editorial discretion is broad; and even if the hearing examiner sat as big editor to review the judgment of the Herald-Traveler staff, the present record does not permit a valid post-audit of the newspapers' decisions to treat news as it did. So far as its publication of crime news is concerned, it is not extraordinary, though it is not laudable, that an aggressive newspaper may lack that fine judicial temperament which always reconciles its privileges under the First Amendment with the rights of a defendant under other amendments.

185. *WHDH–TV Promise and Performance.* On December 15, 1947, WHDH filed an application for a TV construction permit on channel 13, Boston. In July 1952, after the freeze, the application was amended to specify channel 5. Its program proposal then was for network operation, and its breakdown showed 58.7 percent of its time for network programs. Between July 1952 and February 1954, CBS filed a compet-

ing application for channel 5. In February 1954, WHDH amended its program proposal to show a nonnetwork operation, but provided specifically in its application that it would take a network affiliation if a suitable one became available, though it said it could not guarantee that it could get an affiliation. In May 1954, WHDH filed a further program amendment, specifying a nonnetwork schedule with the same proviso for a possible network affiliation. In his initial decision released January 4, 1956, the hearing examiner assigned a comparative demerit against WHDH because of its "proposal that it would operate its television station independent of affiliation with a network unless such affiliation would permit it to continue as it has in connection with the aural broadcast facilities in the past to conduct the type of independent operation it considers in the public interest" (Commission Decision, 22 FCC at 871). The Commission did not reach the same adverse conclusion.

While recognizing that networks provide programing which is of very real interest to the public the Commission cannot and would not approve the proposition that an applicant is to be disfavored if in its discretion it proposes programing which on the record adequately serves the public interest and does not comparatively suffer when considered together with the program proposals of its competitors. Particularly is this true as to WHDH which has pursued a meritorious past record of aural broadcast operation independent of network affiliation. It is to be further noted in this connection that WHDH has not foreclosed itself in this proceeding from a network affiliation. It exercises what must be considered an appropriate management discretion to affiliate only if such affiliation would permit the carrying out of its own plans of programing in the public interest which have been concluded herein to be adequate and comparatively equivalent to that of the other applicants.

186. WHDH entered into a network agreement with ABC in June 1957, filing it with the Commission. It began operation as an ABC affiliate. Its affiliation with ABC continued until December 31, 1960. Since January 1, 1961, it has been affiliated with CBS.

187. In November 1957, WHDH filed its application for license to cover construction permit. In that application, in response to a specific question, it said that it was going to be a network affiliate and carry network programs. It filed no new program schedule with its license application, nor did the Commission request it to do so. (There is, therefore, nowhere in the hearing record a proposed program schedule based on the network operation which, with knowledge of the Commission, WHDH used when it began broadcasting.)

188. BBI and Charles River, with the latter attempting to hold WHDH to an even higher standard of accordance than its rival suggests, contend that WHDH has not lived up to its commitment to carry particular local programs when it won its original grant in 1957. WHDH concedes that these programs were not broadcast, but ascribes this to what it feels is the obvious reason—that its network affiliation, of which the Commission had notice both before grant as a possibility and afterward as an actuality, precluded adherence to the nonnetwork schedule. In illustration of what it calls "the pointlessness of the entire procedure," WHDH notes (step III, p. B(b)(8)–3) that "Charles River calls attention to the fact that in the WHDH nonnetwork proposal, it scheduled 11 news programs on Saturday, and that its composite week showing indicated that it carried only two newscasts on Saturday. [In an apparently corresponding criticism (step III, p. 91), BBI writes: "A substantial schedule of news programs running to 12.7

percent of the schedule (22 FCC 835, 13 R.R. 565q) has shrunk to a limited offering totalling 5.5 percent."] Charles River neglects the fact that the WHDH nonnetwork proposal also scheduled 11 news programs Monday through Friday, at the same times and of the same character as its schedule for Saturday. This was because, in its nonnetwork format, it proposed to follow the approach that WHDH–AM had found so effective in its nonnetwork operation. However, the network program format precludes a Monday through Saturday uniformity, and is based on a Monday through Friday uniformity. Consequently, WHDH, having to jettison its Monday through Friday nonnetwork proposal, did not carry as a vestigial remainder its Saturday program as an independent operation. It rescheduled its Saturday programing to accommodate network and other program requirements, but it did not seek to base it upon a no longer existent Monday through Saturday basic format."

189. WHDH's explanation is accepted. In obtaining its original award it had not received a preference because of its program policies (22 FCC at 872), nor for its proposed program service (22 FCC at 873), all applicants having been considered on a par in these areas. As previously mentioned, the Commission knew of its possible and actual network operation. The mere fact of departure from the particulars of its nonnetwork schedule proposals, required as it was by the practicalities of network operation, cannot be held against WHDH.

190. *Failure To Report Information.* Charles River and BBI charge WHDH with responsibility for failure to comply with the Commission's reporting requirements. Though BBI refers to additional details, essentially its complaint is similar to Charles River's, and it will therefore be sufficient, except in some instances, to consider Charles River's contentions as representative.

191. Charles River asserts that although FCC form 323 (ownership report) requires the corporation to report the price paid for its stock by new shareholders, the WHDH reports have consistently answered the question with the statement: "Not applicable—Purchased and sold in the open market—information not available"; and that this is done even in instances where WHDH knows the price paid as in the Blair and Muller transactions. In reply WHDH maintains that the form is not adapted to publicly-owned corporations whose stock is traded over the counter, as in the case of such public sales the licensee's officials will not know the price paid. It adds (quotations in this section are from WHDH's step III, pp. B(b)(7)–1 ff.; Charles River step II, pp. 110 ff.; and BBI, step II, p. 100): "However, obtaining it in the few cases where it is available would be meaningless, because in the majority of cases it is not available. No reporting is customarily made, therefore, of the price per share of stock changes reported in form 323 by large publicly held corporations whose stock is traded in the open market." Because the Commission's staff has never raised a question about WHDH's reporting of stock sales, even where it is clear it does know the price, WHDH claims the benefit of "this long administrative interpretation." It must be held, however, that broadly as form 323 is drawn, it does not absolve a publicly-owned corporation from making an appropriate reply where its ordinary response is inapplicable: and that it cannot resort to the inaction of the Commission's staff in the face of its own statement that the information is not available.

Nevertheless, as with other reporting inadequacies discussed in this section, there was no advantage conceivably to be gained by WHDH's failure to disclose the consideration where it knew it; and its assertion of ignorance in these transactions can more reasonably be construed as a patterned response than as an attempt to mislead the Commission.

192. Charles River declares that although form 323 demands the identity of both seller and purchaser, and Mr. Talmadge knows it from the transfer sheets for each transaction, WHDH uniformly shows only one party to the transaction, buyer or seller, and routinely answers, "Not applicable—Purchased and sold in the open market—information not available." WHDH denies that Mr. Talmadge knows from the transfer sheets the true identity of each seller and purchaser in stock traded on the open market, as the "most the company can tell is the name of the registered holder listed for the stock at the time it is presented for transfer to a new record holder. It may very well have passed through any given number of hands, brokers or others, in the meanwhile, and there is nothing upon which to base any conclusion that two consecutive record holders had anything to do with each other in terms of the sale of stock by the first to the second. That is why WHDH has, as Charles River states * * * routinely answered 'Not applicable,' as it did to the question requesting information on price, and referred to the same note, 'Purchased and sold in the open market—information not available.'" WHDH again claims long Commission staff acceptance of the practice.

193. Charles River points out that form 323 asks for the citizenship of stockholders, but that in certain cases instead of listing the "citizenship" of a company WHDH noted some occupational characteristic such as "real estate" or "broker." WHDH replies that it "has indicated, where purchasers were not individuals but corporations, etc., the nature of the company's business, insofar as it is known. All of the companies involved were domestic companies and it was deemed by WHDH, and quite apparently accepted by the staff, to be useful information to supply in lieu of a statement such as, 'Not applicable.'"

194. WHDH chooses to interpret Charles River's complaint that WHDH has not, contrary to the requirements of form 323, reported to the Commission the beneficial ownership of stock, as an attempt "to indict, try, and convict WHDH of violating section 4369 of title 39 of the United States Code, dealing with the filing of a statement of ownership, management and circulation (POD form 3526) with the Postmaster General, in order to qualify for second-class mailing privileges." WHDH misconceives the thrust of Charles River's attack. What Charles River really says is that despite the Herald-Traveler's obtaining information on beneficial ownership for POD purposes, it did not report it to the Commission, especially in the case of Greater Boston Distributors, Inc. BBI says that Mr. Talmadge does not even obtain the information for the POD. Neither applicant, however, has primarily attempted to "indict" or "convict" WHDH for contravention of Post Office statutes (though BBI's step II proposed findings has a separate subheading, "Violation of Postal Regulations," and carries this forward to its proposed conclusions, p. 16). In view of WHDH's apparently diversionary indignation at an essentially nonexistent, or at best secondary accusation, it must be held that it has not explained the fact of its not reporting beneficial ownership to the

Commission, particularly as to Greater Boston Distributors—even though it cannot be found that there was anything beyond nonfeasance in WHDH's omission, or that it was actuated by any venal intent or had a motive to mislead the Commission. Quite unsupportable, however, is BBI's denunciation that "It is also apparent that whatever the plan that dictated the result, Talmadge was an amanuensis who had been instructed not only not to concern himself checking beneficial ownership, wherever it was significant, but to keep out of the form 323's whatever information on the subject might come to him."

195. Charles River complains that WHDH has not filed information about family relationships of stockholders, contrary to form 323, even where it had knowledge. Among other instances, Charles River cites (1) the ownership by Florence B. Stephenson, who is, as Mr. Talmadge knew, the sister of George R. Brown, of more than 1 percent of Herald-Traveler stock; (2) Herman Muller's daughter's two sons', and wife's ownership of 100 shares each; and (3) Mr. Ruan's ownership of 260 shares as custodian for his daughter and 265 for his son. WHDH replies that Charles River "incorrectly suggests that form 323 requests information concerning stock held by relatives of officers, directors, or stockholders, which relatives do not hold enough stock to require that their holdings be separately reported. The contrary is the case. The form is quite clear that information is only required to be supplied for relatives, each of whom is required to be reported on the form because of his individual stockholding or official relationship, as the case may be. In the case of Herald-Traveler stock there are only two sets of family relationships which meet this test: (1) the Winslow family relationship; and (2) the Brown family relationship. Both of these family relationships have been fully reported to the Commission"—giving particulars. Here Charles River's position is clearly without merit.

196. Charles River declares that WHDH, Inc. does not advise the Commission of the number of shares of Herald-Traveler stock owned by its officers and directors unless they are also officers and directors of the Herald-Traveler; and that it does not tell of various committees of its board of directors. WHDH counters by pointing out that there is no requirement that WHDH furnish this information.

197. Charles River states that "rule 1.613 requires information to be filed concerning contracts relating to the ownership of stock or to control of the corporation. The Herald-Traveler has failed to report such information." It cites six instances. But as WHDH replies, Charles River "does not add that the corporation referred to is WHDH, Inc. and not the Herald-Traveler Corp. None of the matters listed as not having been filed with the Commission * * * was required to be filed with Commission under rule 1.613," as they deal with Herald-Traveler stock, not WHDH's.

198. Charles River says that "certain changes of decisional significance have occurred at WHDH, Inc. and the Herald-Traveler since the record was closed in this proceeding and notice of such change has not been served on the parties." Perhaps the best way to dispose of this is to quote WHDH: " * * * Charles River cites various items which it alleges WHDH did not notify it or the other parties about. Charles River neglects to mention that all of the parties agreed, including WHDH, that any party could request official notice of any

matter contained in any form 323 or any other ownership filing by WHDH, and Charles River has, throughout its findings, made reference to such filings. It, therefore, had not only actual notice of the matters listed * * * but the tacit understanding among the parties was that filing of reports in the ownership file would be a method of giving notice to the parties. It may be further noted that Charles River quite evidently did not consider any of the matters listed * * * as being of any decisional significance, for it is not sought to reopen the record to make any of them a proper part of the record or to put in any additional evidence related to any of them, or to make any point about them other than that it did not receive personal notification of the filing. Charles River has never asked that copies of WHDH form 323's be served upon it or called to its attention otherwise than by merely filing with the Commission." (As will have been noted, in this initial decision official notice was taken of matters occurring after the closing of the principal record.)

199. *Greater Boston TV Co., Inc.* (Greater Boston II), the applicant in the second part of the consolidated proceedings, was incorporated in February 1963, but its history begins some 10 years earlier. In January 1953, a corporation of similar name, Greater Boston Television Corp. (Greater Boston I, see preliminary statement), filed an application for Boston channel 5. Greater Boston I participated fully in the long, complicated channel 5 proceedings, and is still participating in them. When, in September 1962, the Commission made its grant of a 4-month license to WHDH, Inc., principals of Greater Boston I decided to continue their efforts to acquire channel 5.

200. After meetings and informal conferences of members of the group, it was decided to form a new corporation. Of the 36 stockholders of Greater Boston I, two had died and 4 others had moved far away from Boston. The remaining 30 were invited to participate in the new corporation; 26 of them accepted. Michael Henry, a vice president, director, stockholder, and general manager of Greater Boston I's proposed station, is not a party to the Greater Boston II application. Greater Boston II introduced no evidence as to whether Mr. Henry was one of the Greater Boston I stockholders who had moved from Boston or whether he was invited to join Greater Boston II and had declined.

201. The group decided to retain the basic premise of Greater Boston I—the fiscal equality of all stockholders—and decided also to keep the amount of capital to be subscribed by each stockholder the same—$25,000. To get adequate capital for the new corporation 14 new subscribers were invited to join, bringing the total number of stockholders to 40 and the total capitalization to one million dollars. Thus, in February 1963, Greater Boston II was formed, with 40 equal stockholders, 26 of them veterans of the 10-year fight for channel 5, and 14 new recruits; and all but one of the 40 life-long residents of Eastern Massachusetts. Three Greater Boston II stockholders (Delphin F. Young, John I. Donovan, and Raymond E. Werner) died since its application in docket No. 15207 was filed; there is no indication of the disposition of their stock. Sixty-five percent of Greater Boston II is owned by persons who also own 72.02 percent of Greater Boston I.

202. The directors and officers of Greater Boston II, all of whom are also stockholders, are:

Arthur D. Cronin—Chairman of the Board of Directors.
Arthur J. Gartland—President and director.
Raymond F. Barrett—Director.
Paul J. Cifrino—Director.
Joseph A. De Mambro—Director.
Joseph Gannon—Director (apparently elected to replace Delphin F. Young, deceased).
Daniel J. Lynch—Director.
Sidney R. Rabb—Director.
John E. Sullivan, Jr.—Director.
John Quincy—Clerk.
George A. Rowe—Treasurer.

Each of the above directors and officers was born in or near Boston and has lived there all his life. The years of their birth range from 1890 to 1920.

203. Arthur D. Cronin, an insurance broker, has been involved in the civic affairs of Boston for more than a generation, including the Community Fund, Red Cross and other groups. He has been a trustee of the Children's Hospital, Boston. He is a former member of the State Airport Management Board; served on the executive committee of the Massachusetts Committee for the Hoover Report; and is a papal knight of the Eucharistic Order of the Holy Sepulchre. He is president, a director, and a stockholder of Greater Boston I. Mr. Cronin knew when he signed form 301 (file No. BPCT-1657, docket No. 11070) that section II, item 10(2) was answered "No," and that the same item was answered "No" on form 301 filed by Greater Boston II (file No. BPCT-3171, docket No. 15207). A "Yes" answer, however, would have been in accord with the facts in both instances, as far as Mr. Cronin was concerned. Mr. Cronin knew this, but acted on advice of counsel in regard to the answers.

204. Arthur J. Gartland, an insurance broker, was elected to the Boston School Committee in 1961 and reelected in 1963. He is a former vice president and director of the Greater Boston Chamber of Commerce. He is a director of the Volunteer Cooperative Bank, Boston; and a director of Glenside Hospital, Boston.

205. Raymond F. Barrett, partner in a law firm, a former president of the Massachusetts Bar Association, is a member of the House of Delegates of the American Bar Association. He is a former Special Assistant Attorney General for the Commonwealth of Massachusetts, and is a fellow of the American College of Trial Lawyers.

206. Paul J. Cifrino is a director of the Massachusetts Cooperative Bank, Boston. He has been active in the Catholic Guild for the Blind, Home for Italian Children, Red Cross, Community Fund and South Shore Hospital Fund. He is past president of the Quincy Chamber of Commerce and is a member of Action for Boston Community Development, a Ford Foundation-sponsored study. A chief executive officer for a supermarket chain, he is a consultant on food distribution to the U.S. food for peace program. He is a director and a stockholder of Greater Boston I.

207. Joseph A. De Mambro, chief executive officer of an electronics supply company, has been a director of the National Conference of Christians and Jews; is active in Red Cross, Heart Fund, and Cardinal Cushing Charity Fund work; and is a papal knight of the

Eucharistic Order of the Holy Sepulchre. He is a director and stockholder of Greater Boston I.

208. Joseph Gannon, a securities dealer, is a past president of the Boston Securities Traders Association and a past vice president of the National Securities Traders Association. Mr. Gannon is a past president of the Eire Society of Boston. He received the DSC while with the 26th (Yankee) Division in World War I, making him eligible for membership in the Army and Navy Legion of Valor. He is a stockholder of Greater Boston I.

209. Daniel J. Lynch, clerk for criminal business of the Boston Municipal Court, and a lawyer, has been secretary of several recess commissions of the Massachusetts Legislature; member of a special commission to recodify Massachusetts criminal law; has served on the Advisory Board for Selective Service; and has been active in Community fund work. He is a director and stockholder of Greater Boston I.

210. Sidney R. Rabb, chairman of the board of a Boston supermarket chain, is a trustee and past president of Beth Israel Hospital and a trustee of Massachusetts General Hospital; a trustee of the Boston Public Library, the Museum of Fine Arts, and the Boston Symphony Orchestra; a member of the board of overseers of Harvard College, chairman of the board of overseers of the Florence Heller Graduate School of Social Science at Brandeis University; a regent of Boston College; and a life trustee of Combined Jewish Philanthropies. He is a director and stockholder of Greater Boston I.

211. John E. Sullivan, Jr., an investment banker, has been active in Red Cross and Community Fund campaigns and Civil Defense work; has been a member of the South Shore Hospital finance committee; and is a papal knight of the Eucharistic Order of the Holy Sepulchre.

212. John Quincy, assistant assessor of the City of Boston, is in the real estate and insurance business. He is part owner of several realty trusts; a trustee of Hibernia Savings Bank, Boston; and has been a member of the fund council of the Kennedy Hospital for Exceptional Children. He is clerk and a stockholder of Greater Boston I.

213. George A. Rowe, is a certified public accountant. He has been a director of the Heart Fund, and has been particularly active in youth work. He has been treasurer and a director in Boy Scout, Little League, and Babe Ruth baseball, and youth hockey and football programs.

214. *Program plans.* All but one of Greater Boston II's stockholders are life-long residents of the area served by WHDH since November 1957. They have watched channel 5's performance. To the extent stated in their biographies (it should be noted that in its proposed findings Greater Boston II suggests particular findings only for the officers and directors named above; and though in its exchanged affirmative case exhibit it sets forth some biographical data for the other surviving stockholders, it says nothing about their civic activities) they have lived, worked, and been active in the Boston community all their lives. They believe that WHDH–TV has done and is doing an outstanding job in its programing, with two exceptions; and that its "public service" programing has been especially noteworthy.

215. The two exceptions referred to in the preceding paragraph and the measures Greater Boston would undertake in those instances are: First, it hopes to enjoy the cooperation of all the Boston newspapers, and in turn it would offer to each of them, including the Herald-Traveler, equal exposure and opportunity to participate in news and discussion programs. Second, Greater Boston II believes that a licensee should take an editorial stand on public questions and would institute such a policy as soon as it assumed control of channel 5. The board of directors has decided to form an editorial policy committee. It has already designated Raymond F. Barrett committee chairman. The appointment of other committee members "has been deferred until the time when the committee might be called on to function is closer at hand."

216. Ten years ago Greater Boston I made a survey of community needs for television programing (see 13 R.R. at 557). That survey is still available to Greater Boston II, but in the latter's opinion it would not be useful now. Ten years ago Boston had only two channels on the air, and television programing was, of course, in an earlier stage of development. Greater Boston II believes that the way to determine now whether television is meeting the community's needs is to be an integral part of the community, so that one is aware of its "needs," and to watch television. "Accordingly, Greater Boston II believes that Channel 5 [WHDH-TV] has been meeting the community's needs and [that] its programing should be continued, with the two qualifications referred to above."

217. Raymond F. Barrett, chairman of the prospective Greater Boston II editorial policy committee, has prepared the following statement (Ex. D):

As chairman of Greater Boston's editorial policy committee, I have given considerable thought to what that policy should be. Speaking in general terms, I have come to the conclusion that the policy should be a vigorous one. By this I mean that it should not be limited to taking stands "against sin," or in favor of keeping our streets clean, or similar innocuous or uncontroversial questions. I believe that the people entrusted with the responsibility of operating a television channel, which is a part of the public domain, should not be afraid to stand up and be counted on the really important questions of the day. I have in mind such questions as a sales tax for Massachusetts, or the abolition of the Governor's Council, or capital punishment—these are the type questions which divide our people, and Greater Boston II believes that it should make its voice heard by editorializing on such questions.

While Greater Boston II is politically independent and includes strong adherents of both Republican and Democratic parties, as well as some who are not registered in either party, it should not hesitate to endorse a candidate for public office if there appears to be need for guidance. Thus, if two good men were running for the same office, Greater Boston II would ordinarily not endorse either of them. If, however, as occasionally happens, one party or the other nominates a candidate who is obviously poorly qualified and whose opponent is well qualified, Greater Boston should not be timid about endorsing the well qualified candidate. Similarly, if there is need for guidance in a primary election such guidance should and would be given.

I would add this qualification: if a political candidate were endorsed by Greater Boston II on channel 5, his opponent would be given free time in which to reply. Similarly, if editorial stands were taken on controversial questions a representative of the opposing viewpoint would be given free time to reply.

It would be my hope and purpose to make channel 5 a strong and vigorous

voice for good in the community, not just an observer and reporter of the passing parade.

(S) Raymond F. Barrett
RAYMOND F. BARRETT

COMMONWEALTH OF MASSACHUSETTS
Suffolk, ss:

Subscribed and sworn to before me this 18th day of March, 1964.

(S) John P. Concannon
JOHN P. CONCANNON
Notary Public.

218. The Greater Boston I stockholders who are also stockholders in Greater Boston II consider the Greater Boston II application an extra chance to get a television station in Boston. They have "two balls rolling down the alley" (tr. 20779). The Greater Boston II stockholders who had not been Greater Boston I participants were not advised of and did not consider the possibility of a conflict of interests between the two corporations. (The Commission felt it necessary, as indicated in the preliminary statement, to waive the provisions of rule 1.309 (now 1.519) prohibiting "repititious" applications, in accepting Greater Boston II's application.)

219. In the preparation of its application Greater Boston II relied on its substantial identity with Greater Boston I. There were no formal meetings of stockholders or directors of Greater Boston II between the time it was formed and its application was filed. One informal luncheon stockholders' meeting was held in February or March 1963. At this meeting corporate officers of Greater Boston II were elected and counsel explained the reasons for forming a new corporation to continue participating in the channel 5 proceedings. There was also discussion about enlarging the number of Greater Boston II stockholders to include some who were not principals in Greater Boston I. A few other informal meetings were held. No minutes were kept of any of the meetings. The record does not show any discussion at these meetings on matters such as the policies to be followed by applicant in operating its proposed station (see, however, policy statement in preceding paragraph), or the needs of the communities it would serve. The only discussion about programing in evidence here was at a meeting of Mr. MacRae (see below) and Arthur Haley, another stockholder, in February 1963.

220. Greater Boston II has conducted no interviews and has consulted no reference material to ascertain community "needs," nor has it sought the aid of consultants or experienced advisors (other than its legal counsel). Apart from a decision to editorialize vigorously it has formulated no operating policies (other than by adoption of WHDH's programing) and has prepared no budget. It discloses no plans for a continued study of program policies. As already indicated, it has done no program planning of its own, except for some consideration of news and editorial programs. It made no showing that its principals had any recognizable knowledge of television programing, the Communications Act, the Commission's regulations, or the Commission's policies.

221. *Facilities and Site.* In Greater Boston II's opinion, WHDH–TV has acquired and developed excellent technical facilities for channel 5. If Greater Boston II is successful in this proceeding, it would try to buy from WHDH, Inc. all of its TV fixed assets, and to take

over as far as possible all of WHDH's contracts for film and the like, as well as its studio lease (Greater Boston II knows that WHDH–AM and FM also operate in the same studio building as WHDH–TV. Greater Boston II would try to "sit down with WHDH, Inc. and work out the best possible solution to separating the radio operation from the TV operation" (exhibit E)). If WHDH, Inc., acquiesced, Greater Boston II would lease the property from it rather than buy it.

222. Greater Boston II sent the following letter to Mr. Choate:

GREATER BOSTON TV CO., INC.
31 Milk Street, Boston 9, Mass.
HAncock 6–0800

March 25, 1963

MR. ROBERT B. CHOATE, *President*
THE BOSTON HERALD-TRAVELER CORPORATION
Harrison Avenue, Boston, Mass.

DEAR MR. CHOATE: At approximately the same time that this letter is being mailed to you, the corporation on whose letterhead I write is causing to be filed with the FCC an application for channel 5 in Boston.

At the outset, to avoid confusion, I should tell you that this corporation is a new corporation, incorporated only last month, and should not be confused with Greater Boston Television Corp. which has been a party to the channel 5 proceedings for some 10 years. There is, however, a substantial community of interest between the two corporations in that 26 of the stockholders of the new corporation are also stockholders of the old corporation.

In the application which we are filing today, we propose to the Commission that, in the event we are successful, we would purchase or lease from WHDH, Inc. all of its physical properties related to its television operation and that we would take over from WHDH, Inc., to the extent possible, any contracts it might have for film and so forth, and its lease of the property on Morrissey Boulevard.

We recognize that it is a little unusual to make such a proposal without having first discussed it with the owner of these properties and contracts, and our reason for not making contact with you sooner was that we did not think it was fair to ask you to cooperate in any way with us in the preparation of our application. Now, however, our application has been filed, and we would like to discuss the above proposal with you if you are willing to do so.

If you accept the premise that WHDH, Inc. loses the license to channel 5 and another licensee is named, we believe that by far the best way to transfer the operation of channel 5 from the old licensee to the new would be in the way we propose. We believe this would be best for the people of the area served, for the stockholders of The Boston Herald-Traveler Corp. and, of course, for the new licensee. We also believe that it would be best for the employees of WHDH–TV who could continue their work without interruption as employees of the new licensee.

We recognize that there are many problems which would be attendant upon such a transfer from one licensee to another, but if agreement can be reached on the basic proposal that the best way for all concerned to accomplish such a transfer would be in the way that we propose, we think that all of the other problems are capable of solution.

I would like to meet with you and whatever representatives you may wish to have with you to discuss our proposal further and in more detail.

Sincerely,

(S) Arthur J. Gartland
ARTHUR J. GARTLAND
President,
Greater Boston TV Co., Inc.

AJG :bj

223. The letter of March 25, 1963, was brought to the attention of the Herald-Traveler board of directors by Mr. Choate at a meeting in April or May 1963. He "told the directors what counsel had advised in regard to it" (tr. 12441)—to ignore it. In its exhibit E and in an exact quotation, without change of tense, in its proposed findings Greater Boston II states that:

> Neither Mr. Choate nor the Herald-Traveler Corp. has seen fit to acknowledge the letter, so proof of the practicality of Greater Boston II's proposal and the availability of the property to Greater Boston II must await the hearing, at which time evidence will be offered in support thereof.

224. Questioning of Mr. Akerson at the hearing by counsel for Greater Boston II and other counsel brought out the following: The 1,150-foot guyed tower now used by WHDH–TV for its channel 5 antenna represents a "very substantial investment" (tr. 12436). If WHDH–TV loses the right to operate channel 5 it will still have "a substantial investment in facilities used in the operation of that station" (tr. 12453). Counsel for WHDH conceded that if WHDH could not operate channel 5 it would "have to find other uses or means of disposing of the property" (tr. 12450), (but he did not concede that WHDH would have to deal with Greater Boston II). Mr. Akerson testified that if he were still president and director of WHDH, Inc. and the Herald-Traveler, if WHDH lost here he would have the duty of getting "the best possible return" for the corporate property. Mr. Akerson agreed, in answer to counsel's question, that at that time he would "talk" to the channel 5 winner "to determine how much the property was worth to" the winner (tr. 12464). He would "give consideration to the offer which was the best financial offer," without "restricting my duty to the stockholders which includes continued production of revenues, not necessarily any sale" (tr. 12479). The boards of directors of WHDH, Inc. and the Herald-Traveler have taken no formal action with respect to the matter. At the proper time, however, Mr. Akerson would "feel obligated to take any offers that [WHDH] might receive to the board of directors" of both applicant and its parent, but in assessing the highest "return" for the assets he would take into account tax consequences, community relations of the corporations, their "image," their relation to public service organizations, "the possibility of either using or giving the tower to a UHF quasi-public [station]," "the gift or leasing or other disposition of the facilities to the educational station, channel 2," "the possibility of using the equipment for the production of film or tape programs which would be syndicated or distributed to other stations," and "the financial effect on your own corporation of refusing to sell the equipment to the winner of this particular proceeding insofar as income to the corporation would be possible from a continued operation of the facility while the winner had to construct its own facility" (tr. 12488–90).

225. *Staff.* Generally speaking, Greater Boston II proposes to employ WHDH–TV's present staff. This proposal is consistent with its announced intention to attempt to take over WHDH's physical facilities and to continue its present programs. Greater Boston II believes that WHDH–TV's present staff is experienced and competent, and that it would be foolish to try to replace it with a new staff. It is recognized that some of the employees of WHDH, Inc. work in both

TV and radio, and some also for the Herald-Traveler. Greater Boston II proposes to meet this problem by letting these employees elect whether they wished to work for Greater Boston II. Everyone who now works for WHDH–TV would be offered a place on the staff of Greater Boston II, with one exception.

226. Greater Boston II declares (exhibit F):

> Without reflecting in any way on the competence of the present general manager of WHDH–TV, Greater Boston would employ a new general manager. It would do so in the belief that such a step would be necessary to insure that control of station policy and operation had actually passed from the old licensee to the new. Greater Boston has talked to more than one prospective general manager but does not propose to name any at this time, for the reason that it is impractical to do so because of the probable length of these proceedings. Greater Boston intends to secure the best man it can when the need arises.

227. Greater Boston can identify two persons who would be employed in responsible capacities. William B. MacRae, one of its stockholders, would move to Boston and work full time for Greater Boston II, probably as assistant to the general manager. George A. Rowe, treasurer and a stockholder of Greater Boston II, would work full time at the station as the chief financial officer.

228. The number of employees which Greater Boston II feels that it would ultimately need is set forth below. In view of the proposal to take over the present WHDH staff and the fact that a few people, like Mr. MacRae and Mr. Rowe, might be added, the numbers shown might be exceeded at the outset:

Technical	41
Program	51
Sales	8
Administrative	18
Total	118

There is nothing in the record to indicate that the present WHDH staff would accept employment with Greater Boston II under an unidentified and as yet unselected manager.

229. Mr. MacRae, who is also a stockholder in Greater Boston II, was born in 1922 in New York City, where he now lives. He is vice president of the Television Bureau of Advertising and its director of National Spot Television; he is responsible for coordinating Television Bureau's efforts in national spot television sales. He works closely with stations, station representatives, and group members to promote spot television. Mr. MacRae has been connected with broadcasting since 1948, when he joined the American Broadcasting Co. as an associate television director. With ABC he was engaged in television production and direction of studio and remote programs. From May 1949 to January 1950, Mr. MacRae was general manager of station WGCH–FM, where he instituted a new programing format and sales operation that resulted in the station's running at a profit. In 1950 he joined TV station WPIX, New York City, as an account executive. Late that year he joined the Headley-Reed Co. as a television account executive, representing four television stations in a newly-formed TV department. From August 1951 to November 1955 he was with the Crosley Broadcasting Corp. as a television account executive, selling local time for the four stations to advertisers, and furnishing

market analysis information. He joined the Television Bureau of Advertising as a television account supervisor in 1955. In 1958 he became director of station relations, responsible for membership and income of the company. In 1961 he was named to his present posts. Mr. MacRae is a member of Broadcast Pioneers, Society of Television Pioneers, and Radio and Television Executives Society.

230. Greater Boston II (apart from its offer to acquire the WHDH plant) proposed no auxiliary power generators for either transmitter or studio operation, and no alternative transmitter, microwave, or other equipment to permit operation during a power or equipment failure.

231. In its step II proposed findings Greater Boston II notes: "No one connected with either of the above applicants [Charles River or BBI] evidenced any interest in television programing for Boston in general, or for channel 5 in particular, during the period from 1952 to 1954 when the Commission was accepting applications for channel 5 * * *."

232. Charles River Civic Television, Inc. is a Massachusetts corporation. It was authorized to issue 49,800 shares of class A nonvoting stock with a par value of $5 a share, and 200 shares of class B voting common stock with a par value of $5 a share. Of the authorized stock, 41,000 shares of class A and 200 shares of class B were issued.

233. The officers, directors and holders of the class A common nonvoting stock of Charles River Civic Television, Inc. are:

	Shares
Thomas D. Cabot, chairman of the board	10,000
Theodore Jones, president and director	2,000
John P. Weitzel, clerk-treasurer	------
Robert Saudek, vice president in charge of creative programing and director	------
Judge Lawrence G. Brooks, director	2,000
Charles C. Cabot, director	2,000
Norman L. Cahners, director	2,000
Carlton P. Fuller, director	2,000
Dr. Roy Joseph Heffernan, director	2,000
Ernest Henderson, director	2,000
Dr. Hudson Hoagland, director	2,000
Mrs. Laurence M. Lombard	2,000
Mrs. James H. Perkins, director	2,000
Dwight P. Robinson, Jr., director	2,000
Roger P. Sonnabend, director	2,000
Robert G. Stone, director	5,000
John J. Wilson	2,000

Additional class A stock was issued, as reflected in an amendment authorized January 7, 1966, but these figures are as of the time of the hearing.

234. The bylaws of applicant Charles River provide for an executive committee of the board of directors, which may exercise all the powers vested in the board in the current and ordinary business of the corporation between meetings of the board. Thomas D. Cabot, Theodore Jones, Norman L. Cahners, Carlton P. Fuller, and Mrs. James H. Perkins are members of the executive committee.

235. All shares of the class B voting common stock of Charles River Civic Television are owned by the Charles River Civic Foundation.

The foundation also has options to buy from the stockholders of the class A common nonvoting stock all the stock of the corporation they now own or may acquire. The option price is $6.50 a share, if exercised on or before January 1, 1966, and $7.50 a share, if exercised after January 1, 1966. The purchase price is payable 25 percent 3 years from date of purchase, 25 percent 4 years, 25 percent 5 years, and the balance 6 years from that date, with interest at 6 percent annually on unpaid balances. There is nothing to prevent applicant's present stockholders from making a gift of the stock to the foundation and possibly getting a large benefit under the income tax laws. Thomas D. Cabot testified, however, that if he should give the stock to the foundation he would deduct only the amount specified in the purchase contract for his 13,500 shares, and would not take advantage of the tax laws permitting a deduction of the value of the stock after grant. (See also, par. 314 below.) On an order issued by the Commission granting a construction permit to Charles River, the trustees of the foundation are contractually obligated to exercise the options within 60 days of the date the order becomes final. The stock is voted by the trustees of the foundation, with a majority of the foundation's trustees in office controlling the vote. Ultimately the foundation will own all the stock in the applicant.

236. Charles River Civic Foundation was created by an indenture of trust dated January 24, 1963, between Thomas D. Cabot as settlor and Mr. Cabot, David B. Stone, and Theodore Jones as trustees, as a part of Charles River's plan to apply for channel 5. The indenture recites that the "purposes of this foundation shall be philanthropic and especially to aid and advance education and educational methods within the New England area especially including, but not limited to the making of gifts to, or for the purposes of [here follows a list of education fields]. The foundation is specifically organized and shall be operated exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children, but only in the United States of America. No part of the trust property or the net earnings of this trust shall inure to the benefit of any individual. No part of the trust property shall be used in carrying on, nor shall any of the activities of the trust consist of the carrying on of propaganda, or otherwise attempting to influence legislation. The trust shall not participate in or intervene in any political campaign on behalf of any candidate for public office, or publish or distribute any statements with respect thereto." In an opinion of its counsel, Charles River was advised that although Charles River Civic Television, Inc., itself would pay taxes, because of the ownership of all its stock by the Charles River Civic Foundation the Internal Revenue Service may take the position that it would be bound by the provisions of the Internal Revenue Code relating to exempt organizations. The code permits tax exemption only if the organization is devoted exclusively to religious, charitable, scientific, literary, or educational purposes, and "no substantial part of the activities * * * is carrying on propaganda or otherwise attempting to influence legislation, and * * * does not participate in or intervene in (including the publishing or distributing of statements), any poltical campaign on behalf of any candidate for public office." Counsel said that editorializing, however, was permitted.

237. The present trustees of Charles River Civic Foundation are:

Judge Lawrence G. Brooks	Theodore Jones
Charles C. Cabot	Mrs. Laurence M. Lombard
Thomas D. Cabot	Mrs. James H. Perkins
Norman L. Cahners	Dwight P. Robinson, Jr.
Carlton P. Fuller	Roger P. Sonnabend
Dr. Roy Joseph Heffernan	David B. Stone
Ernest Henderson	John J. Wilson
Dr. Hudson Hoagland	

238. Thomas D. Cabot was born in Cambridge, Mass., in 1897. He lived there until his marriage in 1920, when he moved to West Virginia and lived there for 2 years. Since 1922 he has lived in Weston, Mass., in the Boston area.

239. Mr. Cabot entered Harvard in 1915. Before the United States entered World War I, he took military training with the Harvard Regiment and then at the Citizens' Military Training Camp at Plattsburg, N.Y. He also trained as a flyer at the Curtis Aviation School, Buffalo, N.Y. When Army regulations were changed in July 1917 to allow men of his age to be accepted for aviation, he left Harvard, enlisted in the Army, and was later commissioned a second lieutenant in the U.S. Army Signal Corps, which became the Aviation Service. He taught flying at Kelly Field, Tex., and then at Miami, Fla., for about a year, returning to Harvard College after an honorable discharge in December 1918. He received his A.B. degree cum laude in January 1920 as of 1919.

240. After graduation from Harvard, Mr. Cabot entered his father's manufacturing business, which was centered in West Virginia, though offices were in Boston. Mr. Cabot lived in West Virginia until October 1922, when he returned to Boston to arrange for the incorporation of his father's sole proprietorship as Godfrey L. Cabot, Inc. Mr. Cabot was treasurer and general manager of the new corporation and afterward was elected vice president and then president. The company was merged with its subsidiaries under the name Cabot Corp., as of October 1, 1960. At that time Mr. Cabot relinquished his role as chief executive officer to his oldest son, to become chairman of the board.

241. In connection with his duties with the Cabot Corp., and its predecessor, Mr. Cabot served as director and officer of many affiliated corporations in this country and abroad. Under his direction the company grew from a small operation to become the world's leading producer of carbon black, of well-servicing equipment and pine tar, and an important factor in the production of oil and natural gasoline, silica fune, well-pumping equipment, wollastonite, charcoal, polyolefin dispersions, and large caliber guns for the U.S. Army. The company now operates two partly owned and 18 wholly owned plants in the United States, two in England, and one each in France, Italy, Canada, and Argentina. Its most recent annual sales totaled over $105 million and its assets are over $150 million. The Cabot Corp., also has financial interests and operating responsibilities in plants in the Netherlands, Australia, and Japan.

242. Mr. Cabot played an important role in creating Texas Butadiene & Chemical Corp., in which Cabot Corp., held a 46 percent inter-

est. Texas Butadiene was the largest shareholder in France's principal synthetic rubber producing company. Later, Cabot Corp.'s interest in Texas Butadiene was sold, Mr. Cabot is a Chevalier de la Légion d'Honneur, having been honored by the French Government for his services in establishing the synthetic rubber and carbon black industries in that country. He is also the recipient of a Commendatore Al Merito della Republica Italia for his services in establishing the carbon black industry in Italy.

243. Mr. Cabot has been a member of the board of directors of the First National Bank of Boston since 1936; of the John Hancock Mutual Life Insurance Co. since 1950; and of the American Mutual Liability Insurance Co. since 1939. Between 1936 and 1950 he served as a director for much of the time, as a member of the executive committee, and for 1 year as president of the United Fruit Co., of Boston. He has also been a director of several other businesses, including Plymouth Cordage Co. of Plymouth, Mass., and the New England Trust Co. of Boston. He is a member of the advisory boards of the Massachusetts Investors Growth Stock Fund, Inc., Colonial Growth & Energy Shares, Inc., and the Massachusetts Investors Trust. Mr. Cabot's position as one of five to seven members on the advisory boards of the Massachusetts Trust & Massachusetts Fund dates back to about 1936; he is the oldest member in point of service. The trust and fund together constitute one of the largest investment trusts in the world, with assets over $2.7 billion. Investment decisions in both are made by the trustees sitting with the advisory boards at weekly meetings. Mr. Cabot's duties on the advisory board of Colonial Growth & Energy Shares, Inc., in which he holds a small amount of stock, are similar. He holds no ownership interest in John Hancock, a nominal interest in American Mutual, and less than one one-hundredth of 1 percent of Massachusetts Investors Trust & Growth Fund, Inc.

244. Mr. Cabot has been a trustee or taken an important part in such business organizations as the Committee for Economic Development, the National Industrial Conference Board, the Chamber of Commerce of the United States, and the Committee for a National Trade Policy. Mr. Cabot has served the Federal Government as an adviser to the War Production Board, to the Department of State, and to the Department of Commerce. He also led a special mission to Egypt. During the Korean war, he was Director of International Security Affairs for the Department of State, with primary responsibility for the foreign aid program and for coordinating the Government's relationship with NATO, SEATO, and other multilateral international defense organizations.

245. Mr. Cabot is now a trustee and member of the Corporation of the Children's Medical Center (Children's Hospital) in Boston; an incorporator of Massachusetts General Hospital; a fellow of the American Academy of Arts and Sciences; and a member of the World Affairs Council. He has served on the Boston Community Fund drive for many years, and was a director of United Community Services and the Boston Chamber of Commerce.

246. Mr. Cabot is a member of the governing boards of Harvard, Massachusetts Institute of Technology, Radcliffe, and Escuela Agricola Panamerica (Zamorano, Honduras). He has had similar associa-

tions with the Fletcher School of Law and Diplomacy, Medford, Mass., Hampton Institute, Hampton, Va., and the Winsor School, Boston. He has received honorary degrees from Tufts University, Northeastern University, Morris Harvey College, and Boston University.

247. Mr. Cabot will spend up to 15 hours a week as principal executive officer of applicant Charles River. (Mr. Jones, however, could not recall whether the plans called for office space for Mr. Cabot.) He thought he would devote most of his time to problems of finance, though he could not estimate how long these duties would take after the station went on the air. Initially there would be "some important negotiations to undertake [with WHDH] which I think I can handle" (tr. 20515; 20523). He would moderate (preside over) meetings of the board of directors and the executive committee; and he "would expect that I would take some interest in budgetary matters" (tr. 20515).

248. Mr. Cabot has watched television over the years "very little" (tr. 20340). He testified (tr. 20508): "In the United States, I suppose I see more network than local programs because I am apt to pick the shows which seem to me to be of a little higher quality than you get on local programs." Mr. Cabot did not claim a familiarity with the details of Charles River's program proposal. He felt that programing was Mr. Jones' field rather than his. Mr. Cabot also testified (tr. 20336):

> I think it [the proposed Charles River operating budget] was drafted by Mr. Jones and a number of his assistants in the WCRB organization. I had very little to do with it. I didn't pay much attention to the budget because it seemed to me it was based on a premise that was not likely to happen [that is, that Charles River could not buy the WHDH–TV plant] I realized, however, that we had to file a budget with the FCC.

Mr. Cabot did not "expect to participate in the day-to-day operation of the station" (tr. 20345), though he would "review the work of Mr. Jones," who, as general manager (see below) will be in immediate charge of station operations.

249. The budget had been prepared by Richard L. Kaye (see below) and David Davis, with Mr. Jones' help, and was apparently accepted without question by the other Charles River principals. Neither Mr. Jones nor Mr. Kaye had any television operating experience, and while Mr. Davis was assistant manager of educational station WGBH–TV, Charles River did not establish any other possible qualifications for commercial budget planning. As already noted, Mr. Cabot testified that he had little to do with the budget. Mr. Henderson testified that he had heard discussions of the budget and had seen the figures, but had not checked them in detail (tr. 19975), nor had he suggested any modifications. Mr. Jones conceded that he had not discussed the budget in detail with Mr. Fuller, another director, and added (BBI interprets his remarks as "somewhat rueful," step II, p. 95): "I probably would be better informed if I had" (tr. 18978). In view of the stipulation as to Mr. Henderson's testimony (see below), it must be found that the other Charles River directors gave scant consideration to the budget.

250. Theodore Jones, who will be the full-time president and general manager of applicant Charles River, was born in Council Bluffs, Iowa, in 1911. He has lived in the Boston area since 1948. His father was the

Episcopal minister of a small church in Council Bluffs and his mother was an actress in a stock company in nearby Omaha. His father died when he and the four older children were quite young. Mr. Jones was a child actor on Broadway. He graduated from high school in Pawling, N.Y., in 1935. Since then he has taken business and liberal arts courses at Vassar, Columbia, New York University, Brandeis, and Harvard, and is now working in his spare time toward a degree at Boston University.

251. Since 1942 Mr. Jones has been associated with broadcasting. Findings on this experience appear below. At this point, however, it will be noted that Mr. Jones is majority stockholder and president of Charles River Broadcasting Co., licensee of WCRB–AM and WCRB–FM, Waltham, Mass.

252. Mr. Jones spends an average of 8 hours a week on civic activities. He has been on the board of directors of the Waltham Family Service Association and was its president from 1953 to 1955. He has been on the board of directors of the Waltham Rotary Club. As chairman of the Rotary International Committee he organized the first annual "Into Their Shoes" (a mock U.N.) conference at Brandeis University in 1960; about 40 local organizations participated. He has been on the board of directors of the Waltham Chamber of Commerce, and on several of its committees. Currently he is on its traffic committee, which has prepared a report on traffic and parking problems in Waltham. He has been publicity and public relations chairman for the Waltham Red Cross for the past 10 years; in 1963 as cochairman with his wife he helped to put on the 100th anniversary 2-day conference in Boston. In June 1963, Mr. Jones was given a special citation for his 10 years of Red Cross committee work in Waltham. He was an assistant Scout master for 2 years, troop committeeman for 5 years, and chairman of the Annual Waltham-Watertown Boy Scout Enrollment Campaign for 3 years (1960–62).

253. Mr. Jones was chairman or a member of the Weston United Nations Anniversary Celebration Committee for 3 years. He worked on most of the United Fund campaigns in Boston or Waltham for about 15 years, on publicity, canvassing, public relations, and other committees. From 1960 to 1962 he was on the board of directors of the YMCA Cabot Reservation in Waltham, which furnishes outdoor swimming, camping, and winter sports to hundreds of youngsters.

254. In 1960 Mr. Jones was a member of the Sponsoring Committee for Stuart Hughes, an independent candidate for the U.S. Senate. He has been a cochairman of the Greater Boston Businessmen's Committee, cooperating with "Turn Toward Peace" in bringing speakers to Boston such as Dr. Hudson Hoagland, President of the American Academy of Arts and Sciences. Mr. Jones is a member of the Civil Liberties Union and the United World Federalists. For the past 2 years he has been a member of the Sponsoring Committee of the Council for Constitutional Reform in Massachusetts. In January 1964, he was named chairman of the Radio–TV Committee of the Institute for Constitutional Studies, "a group which is planning an educational campaign on the needs for constitutional reform in Massachusetts" (exhibit 3, p. 8). He was an organizer and has been on the executive

committee of the Weston Fair Housing Committee, helping to get houses on open listings, to bring speakers to town, and to call attention to the new Massachusetts fair housing laws. He has broadcast several editorials over WCRB on fair housing. He was on the organizing and succeeding committees of the Waltham Community Concerts Association, which brings well-known artists to Waltham; currently he is on its board of directors.

255. Mr. Jones was an active member of the Warrendale PTA from 1949 to 1956, and for a time was a member of the PTA board of directors while living in Waltham. Since 1958 he has been a member of the Weston PTA. He was a member of the study committee for the new Weston High School, and an organizing member of the liaison subcommittee of the Weston School Committee. From 1961 to 1962 he was cochairman of the New England Parents Committee for MacMurray College. He was also a member for a short time of the corporation of the Cambridge Center for Adult Education. He was public relations director for the annual Eastern Massachusetts Music Festival, in which 4,000 young people have participated, and which was to be held in Weston in 1964.

256. As general manager Mr. Jones would make decisions on a day-to-day basis. There is no written description of his detailed responsibilities. But he testified that it would be up to him to decide whether a particular matter should be referred to Mr. Cabot, the executive committee, or the board of directors. If Mr. Cabot and Mr. Jones disagree, he testified, "I have the duty of making the decision * * * but because I am working with Mr. Cabot and because he is chairman of the board, if we disagreed greatly on a subject, I would try to ameliorate our differences and if I were not able to, I would either accept his decision or if I felt it was very important, I would take it to the executive committee or the board of directors for their decision on the matter" (tr. 18,966). Mr. Cabot testified that there was no policy on the frequency of Board meetings except "to comply with legal requirements to meet once a year" (tr. 20,525); and that he thought that at first executive committee meetings would be "fairly frequent," but less so later (tr. 20,525).

257. Robert Saudek was born in Pittsburgh in 1911. He has lived in Bronxville, N.Y., since 1940. He received an A.B. from Harvard College in 1932. At the 25th reunion of his Harvard College class he was elected an honorary member of Phi Beta Kappa. He has been in broadcasting since his college days, when he worked nights at station WBZ in Boston. His broadcasting experience is described below.

258. Mr. Saudek is a past president of the Radio & Television Executive Society of New York; former president of the Bronxville Board of Education; a member of the Overseers Committee to Visit Harvard College; a member of the Council of the Harvard Foundation for Advanced Study and Research; and a member of the Visiting Committee to Boston University's School of Communications. He has written articles for professional publications and the New York Times magazine and lectured at universities.

259. Mr. Saudek will spend at least 2 days a week in Boston as a director of applicant Charles River and its vice president in charge of creative programing. He would report first to Mr. Jones. Mr. Cabot

testified that he would also have "direct and easy access and will presumably confer often with members of the board" (tr. 20,344).

260. John P. Weitzel, clerk-treasurer of Charles River, was born in Pittsburgh in 1911. He has lived in Boston since 1961, and before that from 1949 to 1953, when he moved to Washington, D.C. He attended Yale from 1940 to 1943. In 1943 he enlisted in the armed services. After his discharge in 1945 he returned to Yale, receiving his A.B. in June 1946. He graduated from the Harvard Law School in 1949. He was with a Boston law firm until 1953. From 1953 to 1961 he served in various posts in the U.S. Treasury Department, first as assistant to the Assistant Secretary of the Treasury, and then successively as assistant to the Under Secretary, Assistant General Counsel, Deputy to the Secretary, and finally Assistant Secretary of the Treasury. In 1959 he was appointed to the National Security Council Planning Board, and was also appointed U.S. Executive Director of the World Bank.

261. In 1961 Mr. Weitzel returned to his Boston law practice as a partner in Herrick, Smith, Donald, Farley & Ketchum, the firm he had left to go to Washington. He specializes in corporation law. Since March 1962 he has been a director of the Youghiogheny & Ohio Coal Co., Cleveland, a coal mining concern. From June 1962 to August 1963, he was a director of Lombard Industries, Inc., which manufactures plastic injection moulding machines and chain saws; since June 1962 he has been clerk of the corporation. He has been clerk of Baystate Computer Center, Inc., which furnishes electronic processing service to banks, since November 1961. Since March 1963, he has been assistant clerk of Yankee Capital Corp., a small business investment corporation.

262. From 1949 to 1953, and from 1961 to the present, Mr. Weitzel has worked for Boston's United Fund; in 1963 he was chairman of the section handling the solicitation of the 40 largest law firms in Boston. He has helped from time to time in fund raising for Yale University. For the past 2 years he has been vice chairman of the Harvard Law School Fund for the Greater Boston area. He is now helping to raise money for the Massachusetts General Hospital and for Springfield College. Mr. Weitzel spent part of his time in 1962 in politics, chiefly as treasurer of the campaign of a candidate for attorney general of Massachusetts.

263. Lawrence G. Brooks was born in Roxbury, Mass., in 1881. He lives in West Medford, Mass., and except for a few brief periods has lived in the Boston area all his life. He received an A.B. from Harvard College in 1902, and an A.M. in 1903, and graduated from the Harvard Law School in 1905. He practiced law with the Boston firm of Putnam and Putnam for a year. For the next 3 years he was in the Law Department of the Boston Elevated Railway. In 1909 he opened his own law office, continuing practice, except for short periods when he was out of the area on government service, until 1948, when he was appointed presiding justice of the First District Court of Eastern Middlesex.

264. In 1922 he had been appointed special justice of this court, but continued his law practice until his appointment as presiding justice. In 1956 he was appointed associate justice of the Appellate Division of the

District Courts for the Northern District of Massachusetts, a post he held until he became presiding justice of the Appellate Division. In 1920 he had gone to Chicago as counsel for the U.S. Railroad Labor Board. He stayed there for over a year, returning to Medford, where he was city attorney from 1923 to 1927. In 1956 he was elected to a 1-year term as president of the Massachusetts Association of Juvenile Judges.

265. Judge Brooks helped organize the First National Bank of Medford in 1926 and was a director until the bank merged with the Middlesex County National Bank. He continued as a director of the merged bank and was also chairman of the board of managers of the local branch. He is still chairman, but has had to retire as a director of the Middlesex County National Bank because of age limit.

266. Judge Brooks has, for over a half-century been active in civic and religious affairs. These activities now occupy from 10 to 20 percent of his time. He was on the school board of the city of Cambridge from 1906 to 1909. For several years he was treasurer of the Massachusetts Civic League, an organization for community improvement; and before 1914 he was treasurer and executive secretary of the Massachusetts Highway Safety League. During World War I he was executive secretary of the War Service Committee of the American Bar Association, formed to secure lawyers for government service. At the end of the war, he served on a special Presidential committee charged with gathering and editing reports on various subjects for the president. He next held a special job with the U.S. Department of Labor, arranging for the employment of teachers.

267. Judge Brooks was executive secretary of the Massachusetts Council for the World Court, organized to inform the public about the court, and chairman of the Massachusetts Council on Militarism in Education, which furnished speakers opposed to universal military training in peacetime. At the beginning of World War II, he was appointed chairman of the Medford local draft board, a position he still holds. From 1942 to 1948 he was chairman of the Boston branch of the Foreign Policy Association, a public information group. When the Foreign Policy Association merged with two other organizations to become the World Affairs Council, Judge Brooks served as vice chairman for some years and is now a director of the merged organization. Judge Brooks is now chairman emeritus, and from 1946 to 1960 was chairman of the International Friendship League, which brings children from all over the world in touch as pen pals. For some years Judge Brooks has been on the Executive Committee of the Boston Committee on Foreign Relations, an organization for international understanding and world peace.

268. Judge Brooks helped to organize the Medford Community Chest, and Council and was affiliated with the Boston Community Chest, which later became the United Fund. For several years he has been a director of the United Fund.

269. Judge Brooks is one of the Commissioners of Trust Funds for the city of Medford, which supervises the investment of bequests to the city. He is also honorary chairman of the Fair Housing Committee of the city of Medford; honorary vice president of the 20th Century Association of Boston, a civic social club; and honorary sponsor

of the Minuteman Council of the Boy Scouts of America. On February 5, 1964, Judge Brooks received a civic service award for public activities in the Medford community over the past 50 years.

270. Judge Brooks has been a moderator and member of the Parish Committee of his local Unitarian Church. Nationally, he was for 15 years director of the Unitarian Service Committee, a nonsectarian group which aided war refugees with food, clothing and medicine, and has helped foreign countries to organize their educational systems. He was chairman of the board of directors of the American Unitarian Association from 1946 to 1959. When this organization merged with the Universalist Association of America, he was elected director and vice moderator of the Unitarian Universalist Association, positions he still holds. In 1959 Judge Brooks received the annual Award for Service to Liberal Religion from the American Unitarian Association.

271. Charles C. Cabot (Judge Cabot, as distinguished from Thomas D. Cabot, *Mr.* Cabot) was born in Brookline in 1900. He has lived in the Boston area all his life. Since 1931 he has lived in Dover, Mass. In the early autumn of 1918 he enlisted as a private in the Marine Corps and was honorably discharged shortly after the Armistice. He graduated from Harvard College with an A.B. in 1922, and from the Harvard Law School in 1925. He is an honorary member of Phi Beta Kappa.

272. After graduation from law school, Judge Cabot practiced law with the Boston firm of Choate, Hall and Stewart, and then successively became a partner in the Boston law firms of Cabot and Cabot; Warner, Stackpole, Bradley and Cabot; and Ropes, Gray, Boyden and Perkins (now Ropes and Gray). In 1927 he was appointed by the Judges of the United States District Court for the District of Massachusetts as U.S. Referee in Bankruptcy, a position he held until he resigned in 1940. In March 1943 he was appointed Associate Justice of the Superior Court of Massachusetts, and gave up his private law practice.

273. From March to October 1945, Judge Cabot, on leave of absence from his judicial duties, was secretary and chief of the secretariat of the U.S. Strategic Bombing Survey at the request of the Secretary of War. He was awarded the Medal of Freedom for his services with the Strategic Bombing Survey. In September 1947, Judge Cabot resigned from the Superior Court and returned to Ropes, Gray, Boyden and Perkins. Since December 1948, he has been a partner in the Boston law firm of Herrick, Smith, Donald, Farley and Ketchum.

274. Judge Cabot was president of the Boston Bar Association from 1950 to 1952. He had been secretary and vice president. Since 1952, he has been a member of the council of the association. He is also a member of the American Bar Association.

275. Judge Cabot has been a director of National Dairy Products Co., one of the two largest dairy products companies in the country, and a trustee of Provident Institution for Savings. He is a director and member of the Trust Committee of the Old Colony Trust Co.; a director of Fabreeka Products Co., a manufacturer of materials to absorb friction; a director of Devonshire Street Fund, Inc., a closed-end mutual fund; and a member of the advisory board of Investment

Trust of Boston, an advisory board for trustees of mutual funds.

276. Since 1957 Judge Cabot has spent about 10 percent of his time on civic activities. He was an overseer of Harvard College from 1944 to 1950. In 1953 he was president of the Harvard Alumni Association. From 1944 until 1961, he was a trustee of Wellesley College (the maximum term permitted by the college), and was chairman of the board of trustees from 1959 to 1961. In the early 1930's Judge Cabot became a trustee of Milton (Mass.) Academy, a preparatory school for boys and girls. Since the early 1940's he has been chairman of the board of trustees of the academy. Judge Cabot is a member of the board of managers of the Boston Dispensary, one of the oldest medical institutions in the United States and now an outpatient unit of the Tufts Medical Center. He is also a trustee of the New England Center Hospital and a director of Protein Foundation, Inc., a Boston blood research laboratory.

277. Throughout Judge Cabot's professional life, he has served the Community Fund of Greater Boston and its successor, the United Community Services of Metropolitan Boston, in various capacities. In 1943 he was general chairman of the Community Fund drive, which was then known as the Greater Boston United War Fund Campaign. Afterwards, he was for some time chairman of the executive committee of the Greater Boston Community Fund. When United Community Services of Metropolitan Boston was formed, he became its first president. For a part of this period Judge Cabot was also a vice president of the Community Chests and Councils of America. For 1 year during World War II he was head of the USO in Boston.

278. In the late 1940's Judge Cabot was chairman of the New England Regional Loyalty Board for about 3 years. He was president of the United Council on World Affairs in Boston for about 2 years in the mid-1950's. In 1953 the Governor of Massachusetts appointed Judge Cabot chairman of the Special Commission To Investigate Organized Crime and Gambling. The commission was set up to suggest appropriate legislation. Judge Cabot was chairman of the commission until its expiration in 1957, except for periods when the commission was out of existence. After the commission's recommendations were submitted, a State police bureau was created. From the mid-1930's until 1953 Judge Cabot was moderator (presiding officer) at town meetings of the town of Dover. He was a selectman of the town of Dover for 6 years and chairman of the board of selectmen for the last two.

279. Norman L. Cahners was born in Bangor, Maine, in 1914, and spent his early years there. He has been a resident of the Boston area since 1941. He lives in Brookline.

280. Mr. Cahners received an A.B. degree from Harvard in 1936. In his senior year he was elected president of the class and chairman of the Permanent Class Committee, and was appointed undergraduate speaker at Harvard's tercentenary celebration. After graduation Mr. Cahners returned to Bangor, where he started his own business as a salesman of household goods. Two years later his company had over 100 salesmen in New England and was grossing over $1 million in annual sales.

281. On the day after Pearl Harbor Mr. Cahners enlisted in the Navy and was commissioned an ensign. He was made officer-in-charge of the Navy's materials handling laboratory, where he developed new equipment and techniques for handling and moving war materials and testing them under combat conditions. He received 27 United States and foreign patents for inventions of various types of industrial machinery, and a citation from the Navy for his contributions to the mechanization of handling operations. Mr. Cahners started a small magazine for the Navy, The Palletizer, to tell about these methods and techniques to the Armed Forces and war plant executives.

282. Upon returning to civilian life, Mr. Cahners obtained permission from the Navy to convert The Palletizer to a commercial industrial publication. The magazine, now Modern Materials Handling, circulates in both this country and abroad. Cahners Publishing Co., Inc. now publishes 10 industrial magazines in addition to Modern Materials Handling. These magazines have a gross annual advertising volume of over $14 million and a total circulation of over 500,000. The company employs some 500 people and over the past 10 years advanced from 76th to third place in the industrial publishing field. Mr. Cahners was voted the Outstanding Business Publication Executive of 1962 in a national poll of advertising, marketing, and media men. Official notice may be taken of the fact that in a letter dated January 4, 1966, from Charles River's counsel to the Secretary of the Commission, the Commission was informed that on December 21, 1965, in the U.S. District Court for the Northern District of Ohio, Cahners Publishing Co. was indicted for the felony of intercepting mail in order to pry into the business or secrets of another in violation of 18 USC, sec. 1702.

283. In addition to being active in his publishing business, Mr. Cahners is vice chairman and director of National Business Publications, Inc., Washington, D.C. It represents publishers of technical, professional, scientific, industrial, merchandising and marketing magazines, and is the largest business press organization of its kind in the world. He is also a director of Stop & Shop, Inc., Boston, a major grocery chain in New England, with nearly 150 stores throughout the area. Mr. Cahners is a director of Information Handling Services, Inc., Denver, Colo., a company which uses new indexing techniques and microfilm equipment to provide an exclusive information storage, searching and retrieval system called VSMF (Vendor Specs Microfilm File).

284. For several years Mr. Cahners has traveled extensively throughout the United States on lecture tours in response to invitations from national and local advertising associations. In cooperation with the State Department he went to the Soviet Union to study the differences between Russian and American communications systems.

285. Mr. Cahners estimates that he spends from seven to 10 hours a week on civic and community activities. He is currently vice president and trustee of Boston's Museum of Science; trustee of Beth Israel Hospital; and a member of the board of managers of the Boston Dispensary. He is also a director and overseer of the Boys' Clubs of Boston. He is a member of the boards of the Massachusetts Federation of Taxpayers Association, Inc., which is concerned with the problems of local and state taxation; The American Society for Technion, a fund-

raising group for Technion, an Israeli Engineering School; The Arts Center of Boston University; the Boston Opera Group, a locally founded, supported, and directed group which presents operas featuring local talent; and the Charles Street Theater, a professional theater with a repertory company which is community-organized and supported. Mr. Cahners is also a member of the Council of Friends of the Boston Symphony Orchestra, the supporting citizens group for the Orchestra.

286. Mr. Cahners holds key posts in both the Massachusetts Committee for Catholics, Protestants and Jews and the Combined Jewish Philanthropies. In the past 8 years he has received several citations from these organizations.

287. In 1958 and 1959 Mr. Cahners was on the Andover Alumni Council, the governing board of the Phillips Andover Academy Alumni Association. He is a trustee of Northeastern University and a member of the Corporation of the Beaver County Day School in Brookline, a private girls' elementary and secondary school. In 1960 he was appointed chairman of a training program for Brandeis University Trustees.

288. Mr. Cahners is a director of the Greater Boston Chamber of Commerce and chairman of the Advisory Committee on the Chamber's new Boston Magazine. In 1964 Mr. Cahners was presented with three awards won by Boston Magazine in international competition. In 1958 and 1959, Mr. Cahners was New England area vice president, national director, and a member of the Executive Committee of the Young Presidents Organization, an organization of men who became president of companies grossing over $1,000,000 annually before they were 40 years old. He was also an original trustee and treasurer of the Young Presidents Foundation.

289. Mr. Cahners will spend five to 10 hours a week on the station's affairs as a director and member of the executive committee. He will help management in trying to establish an effective public relations program. Mr. Jones has not told Mr. Cahners what his specific duties would be, though as he sees it (tr. 18,983), Mr. Cahners would "probably be divided among the executive committee, public relations work, overseeing editorial policy, looking after fiscal matters."

290. Carlton P. Fuller was born in Mansfield, Mass. in 1898. His home is in Belmont, Mass. He has lived in the Boston area since 1941. Mr. Fuller graduated cum laude in 1919 from Harvard College; he was elected to Phi Beta Kappa in his senior year. In World War I he was a second lieutenant in the infantry at Camp Grant, Ill.

291. After graduation from college, Mr. Fuller worked in the credit department of the Guaranty Trust Co. of New York as an investigator and correspondent until 1923, when he became section head of the Western Electric Co.'s new economics and statistics department in New York. He joined the J. Henry Schroder Banking Corp. in 1927 and a few years later became a vice president. When the Banking Act required separation of investment banking from deposit banking in 1936, he became president of Schroder Rockefeller & Co., the investment banking subsidiary of J. Henry Schroder Banking Corp. Mr. Fuller was a director of Schroder Rockefeller & Co. from 1936 to

1941 and of Schroder Trust Co., another subsidiary, from its incorporation until 1943.

292. While president of Schroder Rockefeller & Co., Mr. Fuller was instrumental in the original financing for Polaroid Corp. and became a member of its board of directors when it was founded in 1937. In 1941 he took a leave of absence from Schroder Rockefeller & Co. and went to Cambridge, Mass. as Polaroid's executive vice president and treasurer. Since the war, Polariod has grown to be the second largest photographic products manufacturer in the world. Mr. Fuller remained with Polaroid from 1941 until his retirement in 1963. He is still a director of the company. During the war Polaroid received a Navy E award for procurement activities and Mr. Fuller personally received an award from the Navy.

293. Since 1956, Mr. Fuller has been a director of the Harvard Trust Co. and is also corporator of the Cambridge Savings Bank. While working in New York he was chairman of the Foreign Securities Committee of the National Investment Bankers Association and a director of two investment trusts and of the Foreign Light and Power Corp.

294. When he was employed in New York, Mr. Fuller lived in New Jersey. He was a member of the Board of Adjustment of Westfield, N.J., which handled zoning exceptions, and president of the College Men's Club. Mr. Fuller has always been interested in music, especially choral music. He is president of the Harvard Glee Club Foundation. Another of his interests over the years has been mountain climbing. He is president of the American Alpine Club and a member of the Appalachian Mountain Club, the Alpine Club of Canada, and the Alpine Club of London.

295. Mr. Fuller spends about half of his time on civic and religious activities. He is interested in the problems of minority groups and was for 7 years chairman of the Cambridge Civic Unity Committee, which handled problems of minority groups in Cambridge, Mass. He also appeared before the State legislature in favor of the Massachusetts Anti-Discrimination Act. From 1954 to the present he has been a member of the Governor's Committee on Refugees, formed to aid in the resettlement of refugees from communism.

296. Mr. Fuller has been a trustee of the Boston Museum of Science since 1950 and was its president from 1952 to 1954. He has also been an elected director of the Harvard Alumni Association. Mr. Fuller has been a member of the Council on Foreign Relations of New York since 1935 and of its affiliated branch in Boston, the Committee on Foreign Relations, since he moved to the Boston area. He is a fellow of the American Academy of Arts and Sciences, president of the Harvard Club of Boston, and a member of the advisory committee to the Harvard Student Agencies.

297. Mr. Fuller was a trustee of the Mount Auburn Hospital from 1949 to 1959. He has worked for the Boston and Cambridge Community Fund Drives.

298. Mr. Fuller estimates that he will spend at least 20 hours a week on the corporate business affairs of applicant Charles Rivers, working with Thomas D. Cabot. He will also act as an advisor to the station on all business programing and as a liaison officer between the station

and area companies when their cooperation is needed in the production of programs. His duties, according to Mr. Jones, will include reviewing the financial aspects of the corporation's operation and assisting in contract negotiations (tr. 18,981).

299 Roy J. Heffernan was born in Holyoke, Mass. in 1894. When he was 4 his family moved to Cambridge, and except for time in the service and a few years at the beginning of his professional life he has lived in the Boston area since then. He now lives in Milton, Mass.

300. Dr. Heffernan attended Boston College in 1912 and 1913, and graduated from Tufts University Medical School with an M.D. cum laude in 1917. In July 1917, Dr. Heffernan was commissioned a junior lieutenant in the U.S. Navy Medical Corps, and served on various ship and shore stations. While on the Bermuda station ship, U.S.S. *Tallahassee*, in October 1918, he organized a hospital on Ports Island during an influenza epidemic. For this a letter of commendation was sent to the Navy Department (the record does not say by whom, but presumably it was by the commandant). After resigning from the Navy in June 1919, Dr. Heffernan trained in obstetrics and gynecology at the Sloane Hospital for Women, the New York Nursery and Child's Hospital, and New York Lying-in Hospital. He returned to Boston in 1921 to specialize in obstetrics and gynecology.

301. Dr. Heffernan is in the active practice of obstetrics and gynecology with an office in Brookline, Mass. He is also a consulting surgeon in obstetrics and gynecology at the Carney, St. Margaret's, Somerville, Quincy, Faulkner, Massachusetts Women's, Milton, and St. Ann's (Fall River) Hospitals. In 1921 Dr. Heffernan began teaching at Tufts University Medical School. He advanced from instructor in obstetrics and gynecology to clinical professor, in which position he served from 1952 to 1958. In 1925 Dr. Heffernan was appointed assistant visiting surgeon to the Department of Obstetrics and Gynecology at the Carney Hospital in Boston and was chief surgeon of that department from 1953 to 1958. In 1958, he was president of the advisory board of the Carney Hospital.

302. Dr. Heffernan has been a fellow of the Massachusetts Medical Society since 1918. From 1928 to 1962 he was councillor of the Society and in 1958–59 he was vice president. Since August 1954, Dr. Heffernan has been a fellow of the American College of Obstetricians and Gynecologists. He was acting chairman of section one (New England and Canada) for 1958–59, and since 1956 has been on the College's Committee on Professional Standards. Since 1956 Dr. Heffernan has been an alternate delegate in the obstetrical and gynecological section of the American Medical Association. He is a fellow of the Boston Obstetrical Society and was its president in 1948. He is also a fellow of the New England Obstetrical and Gynecological Society, was president of the Society in 1943–44, and has been treasurer since 1957. Dr. Heffernan has been a diplomate of the American Board of Obstetrics and Gynecology since 1934, and a fellow of the American College of Surgeons since 1926. In 1948 he was made an honorary fellow of the Cuban Obstetrical and Gynecological Society. He is a member of Alpha Omega Alpha, an honorary medical society founded in 1902. Dr. Heffernan is a contributor to the New England Journal of

Medicine, the American Journal of Obstetrics and Gynecology, and the American Journal of Surgery. In 1957, with Dr. William A. Lynch, he received the Thomas Linacre Award for the most significant contribution to the Linacre Journal.

303. Dr. Heffernan now spends about 2 to 3 hours a week on civic and religious affairs. He was a trustee of the Massachusetts General Hospital in 1944–45 and has been a member of the corporation since 1946. In August 1961, Dr. Heffernan received a Presidential appointment as Chairman of the National Advisory Committee on the Selection of Physicians, Dentists, and Allied Personnel for the armed services, a position he still holds. In June 1959, Dr. Heffernan was awarded the Boston College Alumni Medal for outstanding devotion and loyalty to the alumni. He has also been a member of the Tufts Medical Alumni Council and on the editorial board of the Tufts Medical Alumni Bulletin.

304. Since 1927, Dr. Heffernan has been a member of the Catholic Alumni Sodality of Boston. In 1953 he was president of the Sodality. He has also been a member of the St. Luke's Guild of Catholic Physicians since 1921 and was a principal speaker at its annual meeting in Atlantic City in June 1953.

305. Ernest Henderson was born in Chestnut Hill, Mass., in 1897. Except for a few years while he was a boy, he has lived in the Boston area all his life. He now lives in the city of Boston. Mr. Henderson entered Harvard in the fall of 1914 and remained there until joining the U.S. Naval Reserve at the outbreak of World War I in 1917. He was a student officer, ensign, and then a lieutenant (j.g.) from 1917 to 1918. He received an A.B. degree from Harvard as of the class of 1918. In 1920–1921, he attended Massachusetts Institute of Technology.

306. In the early 1930's, Mr. Henderson became president of Beacon Participations, Inc., a security affiliate of a former Boston bank. Beacon Participations merged with several other companies and in 1946 became the Sheraton Corporation of America. Mr. Henderson was president of this corporation until April 1963, when he became chairman of the board and chief executive officer. He directs the operations of some 85 hotels, mostly in the United States but also in other countries, two office buildings, and other related activities, with about 22,000 employees, and assets of over $264 million. Mr. Henderson is also a director of Thompson Industries, Inc., which manufactures automotive parts; Devonshire Street, Inc., a mutual fund; Trust Management Corp.; American Mutual Liability Insurance Co.; and American Policyholders Insurance Co. He is a trustee of the Investment Trust of Boston, which he organized in 1931, and a member of the corporation of the Cambridge Savings Bank.

307. As a director of Devonshire and as a trustee of Investment Trust, Mr. Henderson participates in directing their affairs, including investment practices. Devonshire, which began business in 1961, has net assets over $27 million and Investment Trust over $93 million. Mr. Henderson and members of his family own less than one-half of 1 percent of Investment Trust but no stock in Devonshire.

308. Mr. Henderson currently spends about one-fifth of his time in civic and educational activities. He was president of the Greater

Boston Chamber of Commerce in 1957. He is a charter member and chairman of the board of the World Trade Center of New England, Inc.; he was its president from April 1958 to March 1961. This organization has been active in efforts to expand foreign trade of New England, and has played a role in the equalization of freight rates for New England states. Mr. Henderson also is on the coordinating committee, a group of businessmen and representatives of civic organizations whose purpose is to attract industries to Boston.

309. As a founding member of the people to people program, founding member of the executive committee, and chairman of the hospitality committee, Mr. Henderson has helped entertain foreign visitors from many parts of the world and participated in overseas programs designed to create a closer relationship between the City of Boston and certain foreign cities. Mr. Henderson is president and a director of Beacon Redevelopment Corp., which was organized by Charlesbank Homes, Inc., a Boston charitable foundation. The foundation advanced $500,000 as an equity investment to Beacon Redevelopment Corp. to enable Beacon to build a $4,800,000 high-rise apartment building for middle-income tenants in a Boston slum area. The project was in part a pilot operation to demonstrate the advantages to the community of urban renewal legislation.

310. Mr. Henderson is a member of the corporation of the Massachusetts General Hospital; a member of the corporation and of the board of trustees of the New England Baptist Hospital; a director of the United Fund; a director of NATO Affairs, Inc.; and a director of the World Affairs Council. He is a life member of The Academy of Political Science; a member-at-large and director of the eastern division of the national board of directors of Junior Achievement; and an honorary member of Beta Gamma Sigma, the National Honor Society of Business Schools. He is Vice President of the Navy League of the United States; and a member of the American Academy of Arts and Sciences; the Institute of Contemporary Art; the Newcomen Society of North America; the Society for Preservation of New England Antiquities; and the visiting committee of the Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University. Mr. Henderson is also a member of the corporation and a trustee of the Eastern States Exposition, which conducts an annual industrial and agricultural fair in Springfield. He is also a trustee of the Boston Arts Festival, which sponsors an annual festival each spring on Boston Common. The festival gives young artists a chance to display their work and presents plays.

311. As a trustee and member of the executive committee of Northeastern University, Mr. Henderson has participated in deliberations resulting in an extensive expansion program for the University. He also made available to Northeastern funds for the acquisition of a large estate in Weston, Mass., which is now the University's center for adult education and known as Henderson House. As a member of the board of trustees of Boston University, Mr. Henderson has assisted with housekeeping problems and with the University's acquisition and development of land for its expansion program. Mr. Henderson is also a member of the board of regents of Boston College, and was one of the original members of the group that organized the

Boston College seminars 10 years ago. These seminars annually bring together groups from education, labor, politics, and business, with the hope of furthering a better understanding of the problems of the Boston area.

312. In May 1950, Mr. Henderson received a Boston Jubilee Award for Industrial Statesmanship, and in February 1959, an award from the National Conference of Christians and Jews. He has been awarded an honorary doctor of laws degree by Boston College and an honorary doctor of the art of oratory degree by Staley College. Mr. Henderson is the author of a book, "The World of Mr. Sheraton," a paperback available, like Gideon Bibles, to guests at Sheraton hotels. It tells how he built a hotel empire from an initial capital of $1,000.

313. Mr. Henderson testified that he was "not a very frequent viewer of programs" (tr. 17927). He was not familiar with either Lassie or Meet the Press. He did not know whether Charles River proposes more local sustaining programs than WHDH now carries or are carried on Boston TV stations WNAC and WBZ. Mr. Henderson conceded that he had seen few if any of Charles River's exhibits until shortly before he testified (he "saw quite a few of" the biographies of other principals, however (tr. 19976). He did not know whether Charles River had a policy with respect to citizenship of its personnel; and he was under the impression that Mr. Saudek was a stockholder. Mr. Henderson thought that Charles River's studio would be in Newton or Needham; in fact, however, a Cambridge location is proposed. By virtue of a stipulation, these findings are also applicable to 10 other Charles River stockholders.

314. Mr. Henderson (and therefore by stipulation 10 other stockholders) testified that Charles River stockholders should not attempt to place a high valuation on their stock, and then give it to the Foundation, as a means of tax avoidance; he felt that as the Foundation was established to help New England educational institutions, Charles River stockholders (in high income tax brackets) would be subject to criticism if they made a high valuation for tax purposes. Indeed, he thought that because of the contractual arrangement with the Foundation on the purchase of the stock, the valuation of the stock could not be more than 150 percent of cost, should the stock be donated to the Foundation. (Mr. Cabot testified similarly, tr. 20540; par. 235.)

315. Hudson Hoagland was born in Rockaway, N.J., in 1899. He moved to Massachusetts in 1921 and has lived in Southboro, Mass., some 15 miles from Boston, since 1948. He enlisted in the Army in 1917. On his release from service he attended Columbia University, receiving an A.B. in 1921. He earned an M.S. from M.I.T. in 1924, and a Ph. D. in psychology from Harvard in 1927.

316. Following award of his doctor's degree, Dr. Hoagland was National Research Council fellow at Harvard from 1927 to 1928, and an instructor in physiology and a tutor in biology at Harvard from 1928 to 1930. In 1930 and 1931 he was special lecturer on sensory physiology and Parker Research fellow from Harvard in the laboratory of E. D. Adrian at Cambridge University in England. From 1931 to 1943 he was professor of general physiology and head of the biology department at Clark University in Worcester. In 1940 and

1941, while on sabbatical leave from Clark University, he was a research asscciate in Dr. Cannon's laboratory in the Harvard Medical School and a tutor in biochemical sciences at Harvard College.

317. Dr. Hoagland has been executive director of the Worcester Foundation for Experimental Biology since he and Dr. Gregory Pincus formed it in 1944. The institution engages in basic research in the biological and medical sciences. It has a staff of some 300, about 100 of whom hold M.D. or Ph. D. degrees. After the establishment of the Worcester Foundation, Dr. Hoagland was a part-time lecturer at Harvard in 1945–46 and a part-time research professor of physiology at the Tufts School of Medicine from 1945 to 1950. Dr. Hoagland now is professor of biology and physiology in psychiatry at Boston University, a nonpaid position in which he helps in the exchange of graduate students between the University and the Worcester Foundation. He is also a director of the Guaranty Bank and Trust Co. of Worcester and of the Schenkman Publishing Co. of Cambridge.

318. Dr. Hoagland was awarded honorary doctor of science degrees by Colby College in 1945, Wesleyan University in 1959, and Clark University in 1962. He is an honorary member of the Japanese Neurochemical Society; a member of Sigma Xi, scientific honor society; and a member of the World Academy of Art and Science, an international agency for the promotion of human welfare, whose 300 members are elected to membership on an honorary basis. Dr. Hoagland was selected as convenor for the 1965 conference, which was to be the first conference the Academy has held in the United States.

319. From 1954 to 1959, Dr. Hoagland was chairman of the Josiah Macy, Jr. Conference on Neuropharmacology. In 1956 he was chairman of the Arden House Conference on Neuroendocrinology. He was on the subcommittee on the Nervous System of the National Research Council from 1954 to 1959, and on the advisory panel of the Biological and Medical Sciences Division of the National Science Foundation from 1958 to 1961. He is now associated with the American Physiological Society; the American Academy of Neurology; the American Society of Electroencephalography; the Association for Research in Nervous and Mental Disease; the Massachusetts Society for Research in Psychiatry; the American Psychopathological Association; the Society for Biological Psychiatry; and the International Brain Research Organization. He is an associate of the Royal Society of Medicine, and a Fellow of the American Association for the Advancement of Science. Dr. Hoagland is president of the National Council of the Congress of Scientists on Survival, an organization which meets annually to discuss critical scientific developments and means of combating their dangers. He is vice president, and in 1954 was chairman, of the Conference on Science, Philosophy, and Religion, an association of theologians, scientists, and philosophers which considers interdisciplinary problems of ethics. He is a member of the advisory committee of the Federation of American Scientists, an organization which is concerned with nuclear war damage and works for the peaceful use of atomic energy.

320. Dr. Hoagland is a trustee of the Communications Research Institute, which studies animal behavior; a trustee of the Research Foundation of the National Association for Mental Health, Inc., which

supports research into nervous and mental disorders; a member of the Research Council of the Age Center of New England; and a member of the Scientific Advisory Committee of the National Council on Alcoholism, Inc. From 1960 to 1961 Dr. Hoagland was Chairman of the Conference on Evolution and Man's Progress and afterwards coedited a book of the papers presented at this conference. He is also editor of Hormones, Brain Function and Behavior (1957) and coeditor of Symbols and Society (1955) and Evolution and Man's Progress (1961 and 1962). He has made about 180 contributions to scientific and medical literature. He is a member of the editorial board which publishes "Experimental Biology Monographs" and the "Annual Review of Psychology"; and is a former member of the editorial board of Psychological Reviews and the Journal of Applied Psychology.

321. Dr. Hoagland now spends about one-third of his time on civic activities outside his profession. For 4 years in the 1930's he was president of the board of trustees of the Bancroft School, Worcester, a private school for boys through the ninth grade and for girls through high school. He is a trustee and member of the executive committee of the Woods Hole Oceanographic Institution and a trustee of the Worcester Memorial Hospital and the George Washington Carver Foundation of Tuskegee Institute. Dr. Hoagland is a member of the visiting committee of the Harvard Medical School and of the Beth Israel Hospital. He was a member of the visiting committee of the M.I.T. Biology Department from 1954 to 1958. He is on the Committee on America's Goals and Resources, a group of business executives and professional men concerned with national goals. He is a member of the National Planning Association; the National Advisory Board of the United World Federalists; and the American Antiquarian Society. He is in his third year as president of the American Academy of Arts and Sciences, an honorary society of some 1900 members representing all the professions, which also engages in various grant-supported study programs.

322. *Mrs. Laurence M. Lombard* (*Cornelia McL. Lombard*) was born in New York City in 1908. She lived there until she married a Boston lawyer in 1931. She now lives in Dedham, Mass., near Boston. Mrs. Lombard attended The Chapin School, New York City, for 10 years, graduating in 1925, and Vassar College for 1 year, leaving in good standing.

323. Mrs. Lombard has no business experience, but is a director of two family corporations, Venetia, Inc. and Eagle Point, Inc., which own and operate Florida real estate.

324. Before 1931, when Mrs. Lombard lived in New York City, she was chairman of volunteers and a member of the Board of Directors of the Charity Organization Society, a nonsectarian case work agency. Before leaving New York, she was elected to the Executive Committee of the Society. For several years she was also a member of the board of directors of the Junior League of New York City. After moving to the Boston area, Mrs. Lombard was a member of the board of directors of the Boston Junior League from 1932 to 1934; part of that time she was in charge of the League's volunteer work in hospitals and welfare agencies. From 1935 to 1936 she was chairman of the Women's Crusade of the Community Fund Campaign of

Greater Boston. She was a member of the board of directors of the Community Fund of Greater Boston in 1940, but resigned in 1941 when she moved to Washington, D.C. During World War II she was a Red Cross Nurses' Aide in hospitals in Westerly, R. I., in the summer, and in Washington. For 3 years she was a director of the Washington Home for Incurables. After World War II she returned to Boston and worked for several years as a solicitor for the Greater Boston Community Fund Drive; she was 1952 cochairman of the Women's Division of Advanced Gifts.

325. Mrs. Lombard was a member of the board of directors of the Parents League of Greater Boston for several years and was its president from 1953 to 1955. The League is an organization sponsoring community projects for children. It has a placement bureau for teenage summer employment and was successful in promoting courses in driver training at most of the independent schools of the Boston area. From 1947 to 1951 Mrs. Lombard was a member and finally chairman of the Women's Committee and a member of the board of directors of The Charles River School, Dover, Mass., a private school for children through the sixth grade. Between October and May, Mrs. Lombard now spends about two-and-a-half days a week on civic activities. She is a trustee of the Family Service Association, a case work social service agency; she had joined the board of directors of its predecessor agency, The Family Welfare Society, in 1933. She has been for many years on committees of the Association and was for 7 years a vice president of the Family Welfare Society. Mrs. Lombard has been a trustee for the New England Conservatory of Music since 1955. From 1957 to 1961 she was chairman of the Committee of Friends of the Conservatory and since 1961 has been chairman of the Conservatory Friends Seminars. She has been a director of the Dedham Temporary Home for Women and Children since 1955. Although the convalescent home formerly administered by this organization is no longer in operation, the directors are now responsible for applying the capital funds and the yearly allocation of income to charitable purposes.

326. Mr. Cabot invited Mrs. Lombard to participate in Charles River in substitution for her husband, who had originally agreed to join and had made a payment on his stock subscription. This payment was returned to him and not credited to Mrs. Lombard, who made her own payment. After one meeting he dropped out because as a cotrustee he is a large stockholder and a director in Dow-Jones Co., publisher of the Wall Street Journal and The National Observer, and it was felt that this association would be disadvantageous in making an argument against a grant to the Herald-Traveler based on its newspaper ownership. Mr. Lombard is interested with Mrs. Lombard in the family corporation of which she is a director. They file joint income tax returns. Before joining the group Mrs. Lombard made no study of the Charles River proposal, and after joining never attended a meeting of principals, stockholders, or directors. She first met Mr. Jones at a meeting of the trustees of the Foundation on September 19, 1963. She had not seen Charles River's hearing exhibits or met its counsel until the day she testified.

327. *Mrs. James H. Perkins* (*Marian Gibbs Perkins*) was born in Baltimore in 1904. She lived there until her marriage to Mr. Perkins,

of Westwood, Mass., in 1930. She has lived in the Boston area since then, at present in Westwood. Mrs. Perkins studied music at the Peabody Conservatory in Baltimore. In 1928 she entered the Towson (Md.) State Normal School, which she left when she was married in 1930.

328. Mrs. Perkins has been particularly interested in health and welfare in the Boston area. About 1935 she made a report to the Westwood town meeting which resulted in the establishment of the Westwood Community Health Association, which administers a community visiting nurse service for the community and is concerned with public health. For several years she ran fund drives for its support and was its first precident. In 1932 Mrs. Perkins became a member of the board of The Children's Mission to Children, a position she still holds. She was chairman of the executive committee from 1946 to 1948 and president from 1948 to 1962. During her term as president she helped arrange for the Child Welfare League of America to make a study of the agency and was instrumental in carrying out the League's recommendations. A new director was appointed and a more highly trained and skilled staff recruited. The agency afterwards affiliated with the Children's Hospital Medical Center, and its work changed from rather routine convalescent care of children with rheumatic fever to care of children with a great variety of physical and emotional problems. The agency also provides counseling for the parents. Mrs. Perkins was also a member of the executive committee of the Children's Hospital Medical Center and chairman of its Social Service Advisory Committee in 1952 and again in 1962. She resigned from the executive committee in 1963.

329. Mrs. Perkins has been associated with a number of other welfare organizations in the Boston area. She was a member of the board of the Community Council from 1945 to 1948, before it joined the Community Fund. From 1947 to 1949 she was on the Children's Agency budget committee of the Community Fund. She was a member of the board of United Community Services in 1950 and 1951, and from 1950 to 1954 was a member of its Health, Hospital and Medical Care Division. From 1954 to 1957 she was on its Central Budgeting and Allocating Committee. In 1946 she was chairman and in 1947 co-chairman of the Women's Special Gifts Committee for the Community Fund. She has also been on the advisory committee of the Boston University School of Social Service, and was associated with the Girls' Club of Boston from 1946 to 1952 and with Children's Services from 1958 to 1960. Mrs. Perkins is a member of the board of the Massachusetts Fund for Children and Youth, the Massachusetts extension of the President's Committee on Children and Youth. The board studies juvenile problems and recommends remedial legislation to the State legislature.

330. Mrs. Perkins is also interested in horticulture and music. From 1938 to 1945 she was a member of the board of Lowthrope School of Landscape Architecture now a department of the Rhode Island School of Design. She was president of the Noanett Garden Club from 1945 to 1946; chairman of the Northern New England Zone Garden Club of America from 1950 to 1953; a member of the Women's Exhibitions Committee of the Massachusetts Horticultural

Society from 1941 through 1958 and chairman of the committee from 1946 to 1948; a member of the board of the Massachusetts Horticultural Society from 1951 to 1957; and a member of the Harvard Visiting Committee for the Arnold Arboretum from 1947 to 1963. Mrs. Perkins is a member of the executive committee of the Friends of the New England Conservatory and was elected the first woman trustee of the Boston Symphony Orchestra in 1962.

331. Mrs. Perkins estimates she will spend 3 days a week on the applicant Charles River's affairs. She will "handle liaison between the station's creative and production staffs and the various community organizations whose cooperation we will seek in the preparation of our various public and community affairs programs" (exhibit 14, pp. 5–6). Mr. Jones testified: "I have not told Mrs. Perkins what her duties are. We have conferred together on the subject and talked about it in general and worked out the basis of what she felt she could contribute, what the time was she felt she could work with the organization, and what the needs of the organization were for her * * * I will tell her what her duties are when I think it is proper to put them in that kind of frame * * *" (tr. 18986).

332. *Dwight P. Robinson, Jr.*, was born in Seattle, Wash., in 1900. He has lived in the Boston area since 1905, except for 1942–44, when he was in Washington, D.C. He now lives in Brookline. He received an A.B. from Harvard College in 1920. He attended the Harvard Engineering School in 1921 and 1922, combining his studies there with some courses at the Harvard Business School. These, together with a full year at the Business School from 1924 to 1925, enabled him to get an M.B.A. degree in 1925. He then spent a year on the staff of the school's Bureau of Business Research.

333. From 1923 through 1931 Mr. Robinson was employed successively by Amory, Browne & Co., textile selling agent in Boston, as a "missionary salesman" for cotton goods; by Lee, Higginson & Co., Boston investment bankers, as a statistician, salesman, and a member of the investment counsel department; and by Lee Higginson Trust Co. as assistant trust officer. In 1932 Mr. Robinson went with the Massachusetts Investors Trust. Except for 1942–44, when he was a civilian in the Navy Department in the Office of Procurement and Material, he has been with Massachusetts Investors Trust ever since, becoming a trustee in 1937, vice chairman in 1950, and chairman in 1954. In 1936 Mr. Robinson became a director of the Massachusetts Investors Growth Stock Fund, Inc., and chairman of this fund in 1954. Both the Massachusetts Investors Trust and the Massachusetts Investors Growth Stock Fund, Inc., are mutual funds. Mr. Robinson recently retired as chairman of these funds, but remains on the advisory committee of both organizations. Together Massachusetts Investors Trust and Massachusetts Investors Growth, which are under common management, are the world's second largest mutual fund organization. When Mr. Robinson retired as chairman his salary was $500,000 a year.

334. Mr. Robinson has also been a director of American Research and Development Corp., a Boston investment company, since 1962; of the Boston Safe Deposit and Trust Co., a banking company, since 1953; of Central and South West Corp., a utility holding company, since 1951; of Diversification Fund, Inc., an investment company in

Boston, since 1961; of Exchange Fund of Boston, Inc., an investment company, since 1963; of John Hancock Mutual Life Insurance Co., since 1955; and of Texaco, Inc., since 1958. Mr. Robinson is a member of the corporations of the Suffolk-Franklin Savings Bank, Boston, and the Boston Five Cent Savings Bank. He was formerly a director of the Cambridge (Mass.) Trust Co., a trustee of the Cambridge Savings Bank, and from 1953 to 1963 a director of the Illinois Central Railroad.

335. Mr. Robinson now spends from 2 to 3 hours a week on civic activities. In 1963 he was Massachusetts chairman of the Radio Free Europe Fund, Inc.; he was reappointed chairman for 1964. He received a Certificate of Appreciation from the Fund in December 1963, for his outstanding assistance.

336. Mr. Robinson is a member of the corporation of Northeastern University and a trustee and member of the committee on facilities. He was an overseer of Harvard College for a 6-year term ending in 1963. As an overseer, he was appointed chairman of the committee to visit the economics department and was chairman of the committee to visit the mathematics department. He is now a member of Committees to Visit the Harvard Economics Department, the Graduate School of Business Administration, the Divinity School, and the Mathematics Department. Mr. Robinson participated in a fund raising drive which resulted in the establishment in 1961 of the Dwight Parker Robinson Professorship of Mathematics at Harvard. The professorship was named in honor of Mr. Robinson's father. A professorship of economics and business administration has recently been established at Harvard as a result of the work of Mr. Robinson and others.

337. Mr. Robinson was president of the Harvard 1920 Class Association of Boston in 1926–1927 and 1934–1935; president of the Boston Club of Harvard Business School Alumni in 1927–1928; and a member of the Harvard Business School Alumni Association Executive Council from 1926 to 1937 and president of that Association in 1929–1930. He was chairman of the finance committee to raise the 1920 twenty-fifth Reunion Gift; chairman of the Harvard Business School Alumni Association Tercentenary Committee in 1936; and treasurer of the Associated Harvard Clubs from 1941 to 1949 and president from 1949 to 1951. He was a member of the Harvard Fund Council from 1943 to 1948, its vice chairman in 1945–46, and chairman in 1947–48. During this period the Harvard fund raised the endowment for the Lamont Library. Mr. Robinson is also chairman of the executive committee and treasurer of the Harvard Class of 1920.

338. Mr. Robinson has been an overseer of the Boys Club of Boston since 1940 and has also been its vice president and member of the Art and Finance committees. He received the Bronze Keystone Award from the Boys Clubs of America in 1959 in recognition of his services. Mr. Robinson was also a director and chairman of the contributions committee of the Cambridge YMCA from 1936 to 1938, conducting three annual fund raising campaigns.

339. Mr. Robinson is a director of the Salzburg Seminar in American Studies, a privately supported organization which holds seminars on American labor, business, education, and law in Salzburg, Austria;

a fellow of the American Academy of Arts and Sciences; and a member of the corporation of the Museum of Science in Boston. In 1940 and 1941 he was treasurer of the Cambridge Committee for Plan E, a group which urged city voters to adopt a charter for proportional representation.

340. In 1960 Mr. Robinson was appointed to serve a 5-year term as a member of the corporation of the Massachusetts General Hospital and was in charge of the general canvass of the Cambridge Hospital Fund Campaign in 1938. He was Cambridge chairman in 1939 and industry and finance chairman in 1940 of the Greater Boston Community Fund Campaigns. In 1957 he was Chairman of the Large Firms Corporate Gifts Division of the United Fund and has been on the fund raising committee since 1961. In 1962 he was appointed to a 3-year term as an individual member of the United Community Services of Greater Boston. He was a director of Denison House, a settlement house, from 1926 until about 1943, and as chairman of the camp committee in 1933 was instrumental in acquiring a new camp site. In 1941 and 1942 he was president of the Boston Council for Social Agencies, which guides all Boston's social work agencies. He was vice president and director of the Greater Boston Chamber of Commerce from 1957 to 1960 and received an award of merit from the chamber "in appreciation for leadership to Boston business and for the guidance and leadership given the chamber in developing a favorable business climate" (exhibit 15, p. 6).

341. Roger P. Sonnabend was born in Boston in 1925 and has lived in the Boston area all his life except for brief periods in military service or on special job assignments. He now lives in Chestnut Hill. He graduated from MIT in 1946 with a degree in mechanical engineering, and in 1949 from the Harvard Business School with an M.B.A. He still takes courses for alumni at the business school, participates in services for top businessmen at Northwestern and the Harvard Business School, and "management development and leadership laboratories" sponsored by the National Training Laboratories.

342. Mr. Sonnabend joined the U.S. Naval Reserve in 1943 and was sent to MIT for officer training. After being commissioned an ensign in 1946, he served aboard the cruiser U.S.S. *Montpelier*. On discharge from the Navy in 1946, Mr. Sonnabend entered the hotel business, serving his apprenticeship at resort hotels and then working for Sonnabend Operated Hotels as general manager of hotels in Atlantic Beach, Long Island, Boston, and Rockland, Maine. In the mid-50's, Mr. Sonnabend became president of Sonnabend Operated Hotels in Chicago, Boston, and Cleveland, and developed these previously independently-operated hotels into a chain operation. In 1956 Sonnabend Operated Hotels merged into the Childs Co., and became the Hotel Corporation of America. Mr. Sonnabend was appointed vice president of the parent corporation and president of the hotel and motor hotel subsidiaries. In 1959 he became executive vice president of the parent corporation, continuing as president of the subsidiaries. In May 1963 he became president of the Hotel Corporation of America. Mr. Sonnabend has been responsible for the expansion of the Hotel Corporation of America from a company with four hotels to one with 27 hotels and motor hotels. In the process he has pioneered many improve-

ments in the industry, including specialty restaurants, budget and control systems, and better facilities.

343. In September 1958, as a result of his various business activities, Mr. Sonnabend was named one of the "Sixteen Bright Young Men in Business" by Esquire Magazine. In 1960 he was honored by the Boston Junior Chamber of Commerce as one of 10 outstanding young men of the year. Mr. Sonnabend is the author of a book on the hotel industry, "Your Future in Hotel Management," and of an article which appeared in Advanced Management-Office Executive Magazine, "Crisis in Hotels—the Decade Ahead." He also participated in a panel discussion on business ethics afterwards published by Challenge Magazine.

344. As chairman of the Harvard Business School's Committee on Continuing Education, Mr. Sonnabend was instrumental in the initiation of seminars and courses for alumni of the business school and has continued to help plan and advise on course content and arrangements. As a member of the advisory committee of the Harvard-Radcliffe Program of Business Administration, he initiated a special course for wives of executives and business women "on an understanding of business" (exhibit 16, p. 4). He has been a director and is now chairman of the board of the National Training Laboratories, a division of the National Education Association, and has helped that organization to develop a fund raising strategy, to create additional financial support, and to change the nature of some of its programs. As convention chairman in 1960 of the Young Presidents Organization, an international group composed of 1,700 presidents of companies of substantial size, he developed a new concept for the annual convention—a "University for Presidents," which offered a wide variety of courses to members and their wives on such subjects as family and community life, world affairs, liberal arts and science. He was international president of the Young Presidents Organization from 1961 to 1962. As an officer and member of various organization committees, he planned and coordinated seminar programs at Northwestern, the Harvard Business School, and elsewhere, initiated European business seminars for potential American exporters, and otherwise extended the educational horizons of the organization.

345. For the past 4 or 5 years Mr. Sonnabend has averaged more than 10 hours a week on civic activities. In 1954 he was division chairman of the United Fund of Greater Boston and in 1963 a member of a special chairmen's committee. Since 1960 he has worked for the Greater Boston Combined Jewish Philanthropies as a member of the board of trustees and on the executive committee. In 1964 he was campaign chairman and developed an organization of over 2,000 people to raise $5 million. Mr. Sonnabend is a member of the Campaign Cabinet of the United Jewish Appeal and from 1962 to 1963 was regional chairman of its young leadership cabinet. As a member of the administrative board of the American Jewish Committee, Mr. Sonnabend has been particularly concerned with civil rights and with fair employment and public housing accommodations for Negroes. He is national vice chairman and New England cochairman of the National Conference of Christians and Jews and has participated in planning activities of the national conference. Mr. Sonnabend is a director of Catholic

Family Counseling, Inc., past New England vice chairman of the National Jewish Hospital at Denver, and a member of the corporation of Peter Bent Brigham Hospital. From 1962 to 1963 he was cochairman of the Boston Arts Festival, heading fund raising committees.

346. Mr. Sonnabend has been a member of the National Export Expansion Council since 1960 and later became a member of its special steering committee. He was chairman of the trade promotion group of the White House Conference on Export Expansion in September 1963. He has solicited funds from hotelmen and their companies and related industries for the U.S. Committee for the U.N., the Committee for Economic Development, and National Bible Week. He is a director of the Newton Taxpayers' Association. Mr. Sonnabend has also been treasurer of the U.S. Squash Racquets Association and secretary, vice president, and president of the Massachusetts Squash Racquets Association.

347. David B. Stone was born in Brookline in 1927. Except for the 3 years when he worked in New York City, his home has been in the Boston area. He now lives in Dedham. From 1945 to 1947 he attended the U.S. Merchant Marine Academy at San Mateo, Calif., where he saw some sea duty. He graduated with an A.B. from Harvard College in 1950, and with an M.B.A. from the Harvard Graduate School of Business Administration in 1952.

348. Mr. Stone went to work in New York City for Hayden, Stone & Co. in August 1952, and has been with it or its successor organization, Hayden, Stone & Co., Inc., since then. While in New York he learned the securities business. Afterwards he developed and supervised the company training program for new personnel and was active in developing financing and investment business for the company. He returned to Boston in 1955 to help in the training of new personnel and the development of the company's New England offices. He became a partner of the firm on January 1, 1957, and a vice president and director of its successor corporation on January 1, 1962. Mr. Stone is a senior regional administrative officer for the New England offices, being responsible for the planning and development of company activities as well as the overall supervision of more than 100 employees.

349. While in New York, Mr. Stone became a member of the Lunch Club, Inc., the Harvard Club of New York, and the Harvard Business School Club of New York. He also participated in the activities of the Investment Association of New York, a group hoping to increase the professional competence of men of 36 and under in the investment business. On returning to Boston, he was elected a member of the Business Associates Club, an affiliate of the Boston Chamber of Commerce, and was on its membership committee from 1959 to 1960. He is now a member of the executive committee. This organization meets to discuss topics of current interest to men with various business backgrounds. Since 1963 Mr. Stone has been chairman of the executive committee on the Investment Bankers Association of America (New England Group), an organization, primarily of investment firms underwriting security issues, which offers programs to improve professional competence and ethics. Since 1962 Mr. Stone has also been cochairman of the Boston Investors Information Committee, an informal affiliate of the Association of Stock Exchange Firms. The committee furnishes investing information to the general public, and

is sponsored by the member firms of the New York Stock Exchange.

350. Mr. Stone is a director of American Electronic Laboratories, Inc., a Philadelphia company specializing in the manufacture of advanced communications equipment and components for military, commercial and medical use; Controls for Radiation, Inc., Cambridge, which supplies radiation detection and prevention service; Fanny Farmer Candy Shops, Inc., Rochester, N.Y.; Hersey-Sparling Meter Co., Dedham, Mass., which manufactures water, irrigation and sewage meters; Plymouth Reinsurance Co., Boston, a casualty reinsurer; and Springfield Street Railway, a busline in Springfield, Mass. Mr. Stone is a trustee of The Amoskeag Co. of Boston, an investment trust, and corporator of the Dedham Institution for Savings of Dedham, Mass., and of the Suffolk Franklin Savings Bank in Boston.

351. Mr. Stone spends an average of 1 to 2 hours a day on civic activities. He is a trustee of Fessenden School and has been president of the Alumni Association since 1959. He is a member of the Boston Harvard class committee of 1950 and of the permanent class committee of 1950. He also was chairman of his sixth class reunion. He has been a member of the corporation of Northeastern University since 1959 and is a trustee of the Civic Education Foundation, an organization furnishing money to the Lincoln Filene Center of Civic Education at Tufts University. The Center trains teachers and young people to discharge their civic responsibilities in a democratic society. For 5 years Mr. Stone was assistant treasurer and overseer of the Boys Clubs of Boston, Inc., with more than 10,000 underprivileged boys in the Boston area, and since 1961 has been treasurer, director, and overseer. He has been a corporator of the Boston Lying-in-Hospital since the fall of 1957 and in 1963 became chairman of the nominating committee. He is also a member of the World Affairs Council, which puts on programs to inform the public of the United States' position in world affairs. He was a director of the council from 1958 to 1962. He has been a member of the corporation of the Boston Society of Natural History since 1958. Since 1959 he has been president of the New England Aquarium Corp., an organization formed to build and operate an aquarium in the Boston area. Since 1962 he has been a member of the corporation of the Trustees of Reservations. It operates and maintains woodlands for the public throughout Massachusetts and works to preserve beautiful or historical sites.

352. Robert G. Stone was born in Brookline in 1898. He has lived in the Boston area all his life. His home is in Dedham. He attended Harvard University from September 1916 to April 1917, and from February to June 1919. He is a member of the Harvard class of 1920 and has been class agent of the Harvard College Fund for many years.

353. Two days before the United States entered World War I, Mr. Stone enlisted in the United States Naval Reserve. He was sent to officers candidate school in December 1917, and graduated in February 1918, with rank of ensign. He served aboard the U.S.S. *Kearsarge* with the Atlantic Fleet and was released from active duty in January 1919, with the rank of lieutenant (j.g.). In World War II he received a captain's commission in the Transportation Corps of the U.S. Army and served in the Office of Chief Transportation, Transit Storage Division. He was honorably discharged in January 1946, with the rank

of lieutenant colonel. For his contributions to the war effort he was awarded the Legion of Merit.

354. In September 1920, Mr. Stone went to work as a runner and messenger for Hayden, Stone & Co. After holding many inside positions with the company, he became a customers' man in 1926, a position he held until 1931 when he was made a partner. In 1937, after the death of Mr. Hayden, the firm's senior partner, the partnership was reorganized and Mr. Stone was made senior partner for the balance of the year. From January 1, 1938, until Hayden, Stone & Co. was incorporated on January 1, 1962, he was a limited partner. Since incorporation he has been a nonvoting preferred stockholder.

355. Mr. Stone is now a trustee, looking after family affairs, with offices in Boston. He also is trustee and member of the executive committee of The Amoskeag Co., an investment company with net assets of over $57 million; a director of Avis, Inc., the car rental firm; a director of Continental Screw Co.; a director of Fieldcrest Mills, Inc., textile manufacturer; a director and member of the executive committee of the Kennecott Copper Corp.; a director of the Lone Star Cement Corp.; a director and member of the finance committee of the New England Mutual Life Insurance Co.; a director of Oceanarium, Inc., an amusement business; a director and member of the executive committee of Olin Mathieson Chemical Corp.; a director of Punta Alegre Sugar Corp., which operates grain elevators; a director of Rivett Lathe & Grinder Corp.; a director of Terminal Operators, Inc., a warehousing concern; a director and member of the executive committee of the United Shoe Machinery Corp.; and a director of the Worcester Bus Co., Inc. Mr. Stone is also a director of Monroe-Langstroth, Inc., a construction firm which is in voluntary liquidation; and he was a director of Merchants Warehouse Co., which was voluntarily liquidated in 1962. He also has interests in other companies. In the past Mr. Stone has been a director of American Agricultural Chemical Co.; a director of Carey, Baxter & Kennedy, Inc., a strip mining company; a director of U.S. Envelope Co.; and a director and member of the executive committee of the Island Creek Coal Co.

356. Mr. Stone was a Brookline town meeting member from March 1930, until December 1942; president from 1941 to 1950 of the board of trustees of South End House, which sets up guidance, recreation and employment programs for underprivileged children in Boston's south end; and a director of united community services from 1956 to 1959. Mr. Stone spends about 12 hours a week on his current civic activities. He is trustee of the Children's Museum, Jamaica Plain, Mass.; trustee of Northeastern University, Boston; trustee of Palmer Memorial Institute, a Negro secondary school in Sedalia, N.C.; vice president and member of the board of directors of United South End Settlements, the governing body of a group of south end settlement houses; president of the board of trustees of Tabor Academy, a secondary school for boys in Marion, Mass.; and trustee of Wellesley College.

357. John J. Wilson was born in Boston in 1907. After graduating from MIT in 1930 with an M.S., he lived in various parts of the country until 1945, when he returned to the Boston area. He has lived there since then. His home is in Brookline.

358. In 1930 Mr. Wilson joined the Crucible Steel Co., Park Works, in Pittsburgh, as a trainee. He worked in various departments, finally as a member of the technical staff of the metallurgical department. In 1932 he became assistant factory superintendent of the Waltham Watch Co., and in 1934 regional sales manager for the Terrell Machine Co. of Charlotte, N.C., selling agent for the Waltham Watch Co. He was appointed sales manager in 1936 and was elected vice president of the Terrell Machine Co. the following year. In 1940 Mr. Wilson became purchasing agent of Sperry Gyroscope, Inc., and in 1941 was appointed general purchasing agent. He was in charge of all purchasing and subcontracting. Mr. Wilson returned to Boston in 1945 to found the Doelcam Corp. for the manufacture of precision instruments. He was chairman of the board, president, and sole stockholder of the company, which expanded from 10 or 15 employees to over 800 employees by 1954. In 1954 Mr. Wilson sold his Doelcam stock to Minneapolis-Honeywell Regulator Co. and became a director and corporate vice president of Minneapolis-Honeywell. For Minneapolis-Honeywell Mr. Wilson helped to negotiate an agreement with Raytheon Manufacturing Co. under which a new electronic data processing company, Datamatic Corp., was formed in early 1955. Mr. Wilson was elected president and a director of Datamatic in addition to his other duties with Minneapolis-Honeywell. To find more time for his personal affairs and his business and educational interests, Mr. Wilson resigned as president of Datamatic and as corporate vice president of Minneapolis-Honeywell in 1957, but is still a director of Minneapolis-Honeywell. In 1957, with two associates, Mr. Wilson formed Controls for Radiation, a company in the nuclear measuring and instrument business. About the same time he became a major stockholder of the Delta Engineering Corp. in Melrose, Mass., designers and manufacturers of high-speed precision electronic counting devices. He is now a director and holds a majority of the stock in each of these companies.

359. Mr. Wilson was a director of the Forbes Lithograph Co. of Boston, which merged in 1960 with Diamond National Match Co. He also was a director of the St. Croix Paper Co., a newsprint manufacturer in Woodland, Maine, which merged with the Georgia-Pacific Corp. in 1962. For a very short time in 1962 and 1963 he was a director of the Bay State Electronics Corp. and for a few weeks a director of Research and Control Instruments, Inc., a local manufacturer of technical electronic equipment, which merged in 1963 into Epsco, Inc. In 1960 he was elected a director of the United-Carr Fastener Corp. of Boston, which is in the manufacture and development of fasteners and other products. In 1963 he was elected chairman of the board of United-Carr. Mr. Wilson is president, treasurer, and sole stockholder of National Instrument Corp., an importing business in Cambridge; of the Reed and Barton Corp. of Taunton, Mass., manufacturers of sterling silverware since 1824; and of the State Street Bank & Trust Co. He is a member of the advisory board of the Colonial Growth and Energy Fund of Boston, and has been a director of the Electronics Trust Ltd. of London, England.

360. Mr. Wilson now gives about four-fifths of his time to scientific and medical education and research. His activities for MIT have included serving from 1946 to 1957 as class agent for the class of 1929;

vice president, and, in 1958–59, president of the Alumni Association; chairman of various alumni activities and functions; a member of the corporation for a term beginning in 1958; and secretary of the corporation (board of trustees) since 1959. He was elected a life member of the corporation in 1962. From December 1959 to June 1963, Mr. Wilson was general chairman of the Second Century Fund of MIT, spending practically all his time on this work. The fund raised $98 million for the school. Mr. and Mrs. Wilson donated the John and Dorothy Wilson Endowed Professorship to MIT and have also established several scholarship funds for needy and worthy undergraduates.

361. From 1956 to 1958, Mr. Wilson was a director of the Greater Boston Chamber of Commerce, and from 1951 to 1960 was a director of the Associated Industries of Massachusetts, a manufacturers' association. He is a trustee of the Museum of Fine Arts in Boston and has been appointed chairman of the trustees' building committee, which is planning an enlargement of the school of the museum and the Museum of Fine Arts itself. Mr. Wilson is also a trustee of the Peter Bent Brigham Hospital in Boston. He has been elected a member and trustee of the Affiliated Hospitals Center, Inc., and a member of its planning committee. He is a trustee of the Park School, Brookline, a private coeducational elementary school; of the Dexter School, Brookline, a private boys' elementary school; and of the Winsor School, Boston, a private girls' elementary and secondary school.

362. *Broadcast Experience of Theodore Jones and Robert Saudek.* Mr. Jones worked as a radio time salesman, in the winter of 1942, at WKIP, an ABC-affiliated station in Poughkeepsie, N.Y. He became sales manager and instituted "Sunday Forums", a discussion program covering local issues. In 1947 he became manager of WHOB (now WGAW), Gardner, Mass. One of the WHOB forum programs dealt with a birth control issue on the Massachusetts 1948 ballot. Mr. Jones' insistence that it was the station's duty to carry the debate cost him his job as station manager. An American arbitration society panel awarded him 13 weeks' salary.

363. In 1948 Mr. Jones started as a salesman for WCRB, Waltham, Mass., a 500-w daytime suburban disk-jockey station. After he had been with the station for a week, he accepted an offer to buy a one-third interest. He bought his stock on a time-payment plan, using his arbitration award as a downpayment. Hearing that WBMS, Boston, was abandoning its good music policy, he persuaded the other two WCRB owners to try good music on the station. He got the discarded mailing list of WBMS and sent persons on it a letter asking for a $3 annual subscription to insure the playing of 2 hours of serious music a day. Four hundred subscribers responded with $3 checks, and in April 1951, WCRB changed to good music. Advertising revenue, however, was meager. Stephen Paine, of Boston, wrote Mr. Jones, asking if he could do anything to help keep good music on the station. Together Mr. Jones and Mr. Paine bought out the interests of the other owners of Charles River Broadcasting Co., licensee of WCRB, and the station went completely classical and semiclassical with its music. Mr. Paine and Mr. Jones acquired equal shares in the station. Mr. Paine lent Mr. Jones

the money to buy his interest, with Mr. Jones' stock as collateral. The loan has been paid off.

364. In applying to the Commission, in 1951, for transfer of control, to him and to Stephen Paine, of Charles River Broadcasting Co., licensee of WCRB, Mr. Jones executed an application in which he responded to section II, item 10(d) of form 314 by answering "no" for himself and Mr. Paine. The answer for Mr. Paine, however (apart from the possible effect of a Presidential pardon), should have been "yes," but is appears that Mr. Jones did not know of the facts which would have made "yes" the proper answer until he was told then in November 1962, by either Mr. Henderson or Mr. Cabot. Mr. Jones did not bring these facts to the attention of the Commission when a renewal application for WCRB was filed in December 1962, although he knew that Judge Brown and Mr. David knew of Mr. Paine's background, as it had been discussed at a meeting of Judge Brown, Mr. David, Mr. Cabot, and Mr. Jones in December 1962. The renewal application was not signed by Mr. Jones but by another officer—possibly the first time since Mr. Jones was connected with WCRB that an application did not bear his signature. The facts were apparently reported to the Commission in a letter of Mr. Paine's attorney, accompanied by Mr. Jones' covering letter dated February 5, 1963, filed later as an exhibit to an application for construction permit for an FM station in Springfield, Mass. Mr. Jones testified that when he asked Mr. Paine about the matter, Mr. Paine told him that his counsel had advised him that item 10(d) should be answered "no" because he had received a Presidential pardon.

365. Mr. Jones testified that he had never met Mr. Paine before the day on which he learned that Mr. Paine might be willing to help finance a good music station in Boston; and that without further inquiry he had introduced himself to Mr. Paine and made arrangements with him to finance the purchase of WCRB, Mr. Paine putting up the money and Mr. Jones undertaking to repay his share of the cost. He had not at the time, nor until he talked with Mr. Henderson or Mr. Cabot, inquired into Mr. Paine's record. Mr. Jones testified that he did not remember the details of the preparation of the transfer application 14 years before. His answers on cross-examination did little to clear up the confusion as to the part he and Mr. Paine, separately or together, played in the execution of the application, or whether he had specifically inquired of Mr. Paine about the appropriate answer to item 10(d). Apparently in reconstruction of his attitude at the time, he testified that he "wouldn't have thought of asking him all those questions," as Mr. Paine "is a mature man" and had signed the application (tr. 18357). Mr. Paine was not called as a witness by any of the parties.

366. In 1952 WCRB applied for a full-time license. The license was granted in 1954, when Charles River Broadcasting Co. also got a license to operate WCRB–FM. WCRB and WCRB–FM were among the first stations in New England to go into stereo broadcasting (stereo then required an AM and an FM station). When the Commission approved it, WCRB–FM added FM multiplex stereo. Since 1961 WCRB–FM has been multiplexing its stereo operations and now averages almost 60 hours a week of multiplex stereo broadcasts.

367. Mr. Jones now owns a majority of the voting stock and is president, treasurer, general manager, and a director of Charles River Broadcasting Co., licensee of WCRB (AM) and WCRB–FM. In 1955, after Commission consent had been obtained, additional stock was issued by Charles River Broadcasting Co. Mr. Jones held 826 shares of voting stock, Mr. Paine 750 shares, and Richard L. Kaye 74 shares and 150 shares of nonvoting stock. In the same transaction Mr. Paine received an option to buy 150 more shares of voting stock. Since then the stock ownership has remained unchanged. Mr. Jones considers the value of his stock great enough to warrant its being accepted as security for a $100,000 loan. He is also president and a director of WCRB, Inc., applicant for an FM station in Springfield, Mass., and of Charles River Broadcasting (Providence), Inc., licensee of WCRQ–FM, Providence. Both corporations are wholly owned subsidiaries of Charles River Broadcasting Co. WCRB (AM) and WCRB–FM are the only broadcast stations in Waltham, a city of 55,000 12 miles from Boston.

368. WCRB–FM duplicates the programing of WCRB (AM). Both stations' program percentages were therefore the same in their most recent renewal applications filed on December 27, 1962. There are no plans for separate programing; WCRB, in fact, has asked for a waiver of the rules to permit continued duplication. The composite week program percentages for both stations were:

	Percent
Entertainment	88.5
Religious	1.1
Agricultural	0
Educational	1.1
News	9.0
Discussion	0
Talks	0.3
Total	100.0

369. The classification of programs by source for the composite week for both stations was:

	8 a.m. to 6 p.m.	6 to 11 p.m.	All other hours	Total
Network commercial	None	None	None	None
Network sustaining	None	None	None	None
Recorded commercial	65.5	52.0	60.0	60.9
Recorded sustaining	23.8	26.6	27.5	25.4
Wire commercial	5.5	5.5	9.7	6.4
Wire sustaining	1.2	None	2.8	1.1
Live commercial	3.7	6.6	None	3.7
Live sustaining	0.3	9.3	None	2.5
Total commercial	74.7	64.1	69.7	71.0
Total sustaining	25.3	35.9	30.3	29.0
Complete total	100.0	100.0	100.0	100.0
Broadcast hours	70	35	27	132
S.A.	462	111	121	694
N.C.S.A.	47	15	65	127

370. With their renewal applications, stations WCRB–AM and FM also submitted to the Commission supplemental program percentages for a week in November 1962, assertedly more representative of the

stations' operations than the composite week. The supplemental program percentages were:

	Percent
Entertainment	87.1
Religious	1.5
Agricultural	0
Educational	1.3
News	9.2
Discussion	0.2
Talks	0.7
Total	100.0

WCRB–FM's renewal application (BRH–790) was granted on March 26, 1963, and WCRB (AM's) (BR–1882) on July 10, 1963. All the programs reflected in the analyses were music except the news programs and two regular programs of commentary a week. In 1957 and for some time before, the stations' policy was to limit broadcasting to music, 5-minute news programs, and no talk or discussion programs. Since 1957 "more and more talking" has been added (tr. 18378). Music programs divide evenly between longer concert music selections and lighter, shorter works. Jazz is limited to 2 or 3 hours a week. WCRB does not carry rock and roll, music with a strong beat, or country music. Reference in the Charles River exhibit (exhibit 28, p. 10) to the stations' news staff is to one staff member who is news director and also triples in brass as public affairs director and program director. The licensee publishes monthly and sells for 35 cents the "CRB Guide to the Entertaining Arts," giving detailed advance listings of WCRB programs. The guide also lists community and cultural events, occasional letters to the editor, and information for music lovers. There is a combination rate for advertisers on the stations and in the guide. In publicity WCRB identifies itself with Boston and only incidentally with Waltham, but there is no evidence that its station identification announcements are not in compliance with the Commission rules. WCRB is a class III station operating with 5 kw. power on a regional channel. Because, Mr. Jones testified, "we considered our service area to be larger than just Waltham" (tr. 18658), a listener survey was not classified to segregate the responses of Waltham residents. The record does not show that any particular class of Waltham residents was contacted in a formal survey except for some Waltham ministers on religious programs. In the last election campaign, candidates for Mayor of Waltham and the Waltham School Committee appeared on free WCRB programs. Mr. Jones also believed that Waltham dramatic clubs have appeared on WCRB. In exhibit 28, p. 28, Charles River notes that WCRB "supplement[s] our regular newscasts with two 5-minute public service programs each day, Monday through Saturday, called 'Events of Note' on which we broadcast announcements of social, cultural and educational events and activities in the Waltham, Newton, and Greater Boston areas." On its "Opinion" program WCRB criticized the mayor of Waltham for his failure to support better salaries for school teachers and invited him to reply (he did not accept the invitation). From January 1 to November 15, 1962, WCRB broadcast announcements for Waltham Community Concerts, Waltham Division of Employment Security, Waltham Family Serv-

ice, and Waltham Hospital. Mr. Jones lived in Waltham for 8 years, and has talked to many of its residents. As noted previously, he has been active in Waltham community affairs; and, as mentioned below, the Waltham Rotary Club awarded both him and WCRB a citation for their community activity.

371. With the broadcasts of the Boston Symphony Orchestra's Saturday concerts in 1957, WCRB became the first station in the United States to present an entire season of a major symphony orchestra in stereo. Since then WCRB has broadcast in stereo concerts of the Boston Symphony Orchestra live or on tape 52 weeks a year. It has also broadcast live in stereo, since 1958, the Saturday evening Boston Pops Orchestra concerts. Other "Pops" concerts are taped and then broadcast by WCRB on Sunday afternoons every week of the year. WCRB also tapes for later broadcast in stereo the Boston symphony concerts at the Berkshire Music Festival at Tanglewood in Lenox, Mass.

372. WCRB is a charter subscriber to the Boston Symphony Transcription Trust. The trust was established by the Boston symphony to provide tapes of the orchestra's concerts for broadcast by American stations. Each year 52 concerts of the symphony orchestra and 26 concerts of the pops orchestra, among other concert programs, are offered for broadcast at moderate rates through the trust. In 1962 WCRB began producing master tapes for the trust and in 1963 became the sole licensee of the trust. At present it supplies the tapes to 30 stations.

373. WCRB also broadcasts the weekly concerts of the New York Philharmonic Orchestra and the Philadelphia Orchestra. For almost 8 years WCRB has presented a complete opera on Saturday afternoon. For over 9 years WCRB has produced and presented taped weekly programs featuring glee clubs, college choruses, and amateur choral groups. It has broadcast the performances of over 50 New England choral groups on this series. WCRB has produced and broadcast every Saturday afternoon for 4 years organ recitals recorded in Boston churches. A broadcast committee of the American Guild of Organists selects organists from the Boston area, as well as student organists and visiting concert artists, for these recitals.

374. In a cultural exchange program WCRB exchanges music with Australia, Israel, Japan, Rumania, Spain, and the U.S.S.R. It is able, in this way, to get musical recordings in most cases otherwise unobtainable in the Boston area. It also broadcasts recorded music received from the Canadian Broadcasting Corp., the British Broadcasting Corp., and from radio organizations in France, Italy, Germany, Japan, the Netherlands, the Dominican Republic, Greece, and Belgium.

375. Other good music programs broadcast by WCRB include "The Armenian Culture Hour," featuring Armenian music and tradition, presented in cooperation with the Friends of Armenian Culture Society, Inc. The program is commercial. WCRB classifies it as educational because it is sponsored by "a group of leading citizens of Armenian extraction whose aim is to educate [sic] the community at large to the culture of Armenia" (tr. 18381). In 1963 WCRB broadcast a series of Saturday concerts of the Greater Boston Youth Symphony Orchestra. It also carries other music groups. Throughout the year, and especially at Christmas and Easter, it broadcasts religious

music. On Christmas Day WCRB carries 17 hours of music on a program sponsored by the Boston Globe, interspersed only with brief announcements to identify the sponsor and express holiday greetings from the Globe and WCRB.

376. For the past 4 years WCRB has presented "Jazz with Father O'Connor" on Saturday evenings. Father O'Connor is a jazz columnist and a director of the Newport Jazz Festival. In 1963 the station added "Folk Music, U.S.A." to its Friday evening schedule. This program features recorded folk music and occasional live appearances by Boston area performers.

377. WCRB's regular newscasts play down sensationalism both in content and in the announcers' delivery. On Monday through Friday WCRB also broadcasts "Opinion," a 10- to 15-minute program of commentary, interviews, or editorials. (The editorials were formerly 10 minutes long, but WCRB is now trying shorter editorials repeated throughout the week.) In April 1962, five "Opinion" programs dealt with the economic impact of disarmament. In 1963 WCRB carried a series of five programs on the Boston schools.

378. "Point at Issue" is a discussion program on Sunday at 7:05 p.m. Although the program is normally scheduled for 25 minutes, on a few occasions it has run as long as 55 minutes. Taped recordings or excerpts from seminars, PTA meetings, League of Women Voters' meetings, and school debates are broadcast. WCRB publicly invites the presentation of views opposing its editorials, and has often turned over the same time period the week following the original editorial to another speaker for a reply.

379. WCRB prohibits musical jingles in advertising copy. It does not allow commercial announcements to interrupt a musical work like a symphony movement. Commercials which its program department thinks are "strident" or "raucous" are not accepted. After the publication of the "Surgeon General's Report," WCRB banned cigarette advertising. At one time, for 13 weeks, it accepted hard liquor advertising after 11 p.m., but at the request of the president of the NAB it stopped the liquor spots and has not carried them since then. In the past 3 years WCRB's maximum number of commercial spots has been about 4 minutes an hour from 1 to 4 p.m., and from 8 p.m. to midnight during symphony hours, and at other times about 8 to 11 minutes an hour. Mr. Jones had no detailed knowledge of WCRB's logging practices. Logging procedures, as well as the mechanics of filing renewal applications, are the responsibility of Richard L. Kaye, vice president and general manager. Generally speaking, clients buying spot announcements on WCRB are given free promos and courtesy announcements as part of the package, but they are not referred to in the contract. Mr. Jones testified that he did not know the percentage of sponsors who had received these free services, nor how they had been distributed. He left distribution to the station's commercial manager, who, he said, "is a very fair man" (tr. 18430). WCRB sells political spots, but does not give purchasers courtesy announcements. (Charles River's television station, Mr. Jones testified, would not have free promos and courtesy announcements because "it is a different kind of a

company—a different kind of media, a different kind of laws of supply and demand" (tr. 18443).)

380. WCRB won the Variety Award as the Outstanding Good Music Station in America (1955); an honorary citation from the Bruckner Society of America, Inc., in recognition of its services to the music of Gustav Mahler and Anton Bruckner (1960); a Special Award of Merit in the National Federation of Music Club's Parade of American Music (1963); and a TV-Radio Mirror Salute for Music of the Nations as the Best Radio Music Program in the Atlantic States, 1959 to 1960. A series of editorials calling attention to sums allegedly owed to Boston hospitals by the March of Dimes and to the organization's expensive public relations campaigns, won a citation from the United Press. An editorial entitled "The Packaged Candidate," dealing with candidates groomed by Madison Avenue, also won a citation. Both WCRB and Mr. Jones have received a citation from the Rotary Club of Waltham for meritorious community work (see above).

381. Mr. Jones' broadcast experience has been in radio, but since joining applicant Charles River he has studied television in this country and abroad. He has discussed station operation and programing with personnel of seven American television stations, with a staff member of NBC's "Today Show," with the CBS production department, and with personnel of the National Educational TV-Radio Center in New York City. In July 1963, he visited the London studios of the British Broadcasting Corp. and spoke to its director of television and staff members; he also toured the BBC White City Television Center. Mr. Jones also visited commercial network companies in England and government stations in other European countries. Since September 1963, Mr. Jones has worked from 6 to 12 hours a week in various departments at WGBH–TV, the Boston educational station, to learn about television techniques. He took a course in film production at Boston University, and in 1964 he enrolled in a summer television workshop course at B.U. He apparently felt that he would also learn on the job, as he testified that "it would take much more care in doing something than in proposing something" (in the application).

382. In belittling Mr. Jones' expertise even in his present field of radio, however, BBI points out, as an example, that he did not know whether promotional announcements for sustaining programs were counted as NCSAs; and that he thought that Commission regulations required key employees to be U.S. citizens. BBI also contends Mr. Jones "had a very confused notion of how a proposed typical week was to be constructed for the purposes of the Charles River application. Normal procedure when a network affiliation is proposed is to construct a typical week around a network schedule taken as of a given date" (step II, p. 43, Negative Findings as to Charles River). Charles River's proposal of a typical week contained elements of a CBS schedule dated April 1963, and of one dated September 1962, as well as items from an announced future schedule stretching a network news show from 15 to 30 minutes because Mr. Jones read in trade journals that the program was to be expanded to a half-hour in the fall of 1963, a development which, in Mr. Jones' words, accorded with "our block-

ing of news and our thinking about suppertime news as a whole" (tr. 19434).

383. Though perhaps not logically appropriate at this point, the following may be mentioned. Even discounting the contentions of BBI (step II, pp. 114 ff.) by the going rate applicable to advocacy, it must be found that on occasion Mr. Jones was a wary witness, hesitant to commit himself to a positive answer, at times to the point of not admitting the obvious. An example of his shyness in the face of the incontrovertible to which BBI refers was his refusal to admit that Esso is a large company because he had not seen its balance sheet. At other times his answers varied along a scale from an equivocal to an ultimate positive response, or, in the reverse, from assurance to doubt. He also, at times, seems to have attached what BBI calls a private meaning to words. Thus, asked to comment on the statement in Charles River exhibit 28, p. 5, which he had reviewed and approved, that WCRB had "no patent-medicine advertisements," Mr. Jones admitted that WCRB would accept a Bufferin commercial if it was inoffensively worded; that "generally speaking" (tr. 18615) on the same conditions it accepted advertisements for Anacin; and that in fact the station accepted patent-medicine ads if they were in good taste and their claims were not under investigation by the Federal Government. In explanation of his definition of patent medicine he testified (tr. 18694): "I did not necessarily use any dictionary mention [meaning?] of the term, sir, when I used it. I used the connotation that goes with the thought" patent medicine "and to me it connotes kind of dubious preparations. If I have used it wrongly, or not very accurately, I apologize." It is impossible, however, to determine to what degree Mr. Jones' testimonial vagaries are attributable to his 15-day ordeal under cross-examination.

384. Mr. Saudek began his broadcast career at station KDKA, Pittsburgh, while still at school. After graduation from college, he was with station WWVA, Wheeling, W. Va., for 2 months, as program director of its Pittsburgh studios. He then worked for the Yankee Network in Boston for 5 months in 1933. From August 1933, until 1938 he was a continuity editor for KDKA. Mr. Saudek wrote most of the station's plays and documentaries and approved or edited all scripts, commercials, and other program material, to conform to the continuity acceptance policies of NBC, which managed and operated KDKA.

385. In 1938 Mr. Saudek became assistant to the sales manager of the NBC Blue Network in New York City. He worked in sales, rate structure, programing, station relations, and audience promotion. From 1939 to 1942 Mr. Saudek was assistant to the director of the Blue Network, where he gained experience in every phase of network operation.

386. From 1942 to 1944, Mr. Saudek worked for the executive vice president of the Blue Network Co., Inc., which had been established by RCA as a wholly owned subsidiary in 1942. His main duty was to carry out the separation of RCA's two networks and to set up the Blue Network as an independent operation. He worked on negotiations of leaseholds, separation of talent and sponsor contracts, labor union codes, establishment of broadcasting and sales policies, the Blue Net-

work's organizational structure, and development of corporate procedures.

387. In 1944 Mr. Saudek went to England for the Office of War Information as manager of the American Broadcasting Station in Europe (ABSIE). The station had a staff of some 300 who prepared news and features directed to the Axis powers and to the occupied countries of Europe. As manager of the station, Mr. Saudek was responsible for its operations, but not for its editorial policy.

388. In 1945, Mr. Saudek returned to the Blue Network Co., which had been bought from RCA and had become the American Broadcasting Co., Inc. In 1947 he was elected vice president in charge of public affairs for ABC, a position he held until 1951. During this period Mr. Saudek also assumed responsibility successively for the network's departments of research, continuity acceptance, press information, public relations, and sales promotion, and became administrative aide to the president. In time he was in charge of all these departments, in addition to retaining his position as vice president in charge of public affairs.

389. As director of public affairs for ABC in 1946, Mr. Saudek produced "Hiroshima," a series of four half-hour readings by actors of John Hersey's report as published by the New Yorker magazine. The program won the Peabody Award for 1946.

390. While vice president in charge of public affairs at ABC from 1947 to 1951, Mr. Saudek produced all ABC public affairs programs on radio and television. Included among these programs were:

"Slums I and Slums II"—Documentary studies of slum housing in the U.S. and of corrective measures.

"Communism: U.S. Brand"—A documentary on the internal operation of the Communist Party, U.S.A. Peabody Award.

"The Berlin Story"—Documentary on the Berlin Blockade and the airlift, researched in Germany in 1948.

"The Ramparts We Watch"—Documentary on ECA (the Marshall Plan) in action. Researched in Western Europe, 1949.

"Clear and Present Danger"—A documentary study of the law and facts relating to the Government's loyalty program (1949).

"World Security Workshop"—A weekly radio series of original plays, chosen by contest, on the reduction of world tension.

"A Child's World"—A weekly radio and TV series of taped interviews with children on their experiences and views about a variety of subjects, conducted by Miss Helen Parkhurst.

"United or Not?"—A weekly TV series of conferences with delegates to the United Nations and some heads of state. Questions by U.N. correspondents.

"On Trial"—A weekly TV series, using "direct and cross-examination" on foreign and domestic issues, featuring leading trial lawyers and judges with expert witnesses. Done by arrangement with the Law Schools of Harvard, Yale, and Columbia Universities, and with the Bar Association of the city of New York.

"United Nations Roundtable"—Mrs. Eleanor Roosevelt as a chairman of a weekly radio panel discussion with U.N. delegates. From Hyde Park, New York.

391. In 1950 Mr. Saudek, together with two other ABC executives, Robert E. Kintner and Joseph A. McDonald, received a special Peabody Award for their refusal to cancel Gypsy Rose Lee from the ABC schedule when this was demanded by the American Legion in national convention under public threat of boycott because of Miss Lee's pur-

ported association with an allegedly left-wing cause. Miss Lee was not canceled because Messrs. Kintner, McDonald, and Saudek could find no basis for the charges, which the Legion did not substantiate.

392. In 1951 Mr. Saudek resigned from ABC to accept an offer from the Ford Foundation to organize a TV-radio workshop. His first series for the TV-radio workshop, "Assembly VI," was a weekly filmed report of the Sixth General Assembly of the United Nations which was being held in Paris and was not otherwise covered by television. Arthur Schlesinger, Jr., then associate professor of history at Harvard, narrated the programs and analyzed the assembly's actions. "Assembly VI" was carried for 12 Saturday evenings by the NBC television network in the fall of 1951.

393. Simultaneously with the production of "Assembly VI," the TV-radio workshop produced a 26-week series, "The People Act," taped reports of grass roots "self-improvement" activities by communities throughout the United States. Mr. Saudek was executive producer of this program, which was carried by the CBS radio network.

394. The program idea for "Omnibus," the major enterprise of the TV-radio workshop, had been developed in detail by January 1952. It was to be an integrated 90-minute television show covering a variety of subjects. The first "Omnibus" program was telecast in 1952. The series continued on the CBS network on a commercial basis until 1961.

395. "Omnibus" was produced live for 26 weeks each year for 5 years, from 1952 to 1957, under Ford Foundation auspices, and for 4 more years, between 1957 and 1961, by the part of the TV-radio workshop staff which became the independent producing firm of Robert Saudek Associates, Inc. More than 200 programs were produced, totaling some 300 hours of television and nearly 100 different features. In its first year, 1952–1953 "Omnibus" presented 23 plays, nine serious music features (including four operas), 12 ballets, nine history and biography programs, seven features on sculpture and painting, seven science subjects, six studies of contemporary life, and five productions for young children.

396. "Omnibus" included features like Peter Ustinov in "Boswell's Life of Samuel Johnson"; "Leonard Bernstein on Bach," "Jazz, Beethoven, What Makes Opera Grand? and the Art of Conducting"; "The Youth and Boyhood of Abraham Lincoln," in five parts, written by the late James Agee; the "Boston Museum of Science"; "The New York Times"; "A Study of Harvard University"; "The Powers of the President," narrated by McGeorge Bundy; "The Renaissance," starring Charlton Heston; five plays by William Saroyan; Agnes DeMille on "The Art of Ballet," William Faulkner on his home town; the Metropolitan Opera Company in three TV productions; Orson Welles in "King Lear"; and a five-part study of the "Adams Family from John to Henry," narrated by Allan Nevins.

397. "Excursion," a junior 30-minute version of "Omnibus," was produced by the TV-radio workshop for broadcast over the NBC–TV Network for 26 weeks during the 1953–54 season. Burgess Meredith was its host. For want of sponsorship "Excursion" was not resumed by the foundation.

398. "Omnibus" and "Excursion" received more than 80 national awards, including the Peabody Award and nine Emmys.

399. The Ford Foundation decided not to continue the TV-radio workshop beyond June 30, 1957. The workshop assets were purchased from the foundation by staff members who incorporated under the name of Robert Saudek Associates, Inc. Mr. Saudek is the executive producer and has the right of final decision in all programing matters. Besides Mr. Saudek, the associates are Walter Kerr, drama critic of the New York Herald Tribune; Alistair Cooke, chief U.S. correspondent of "The Guardian"; Mary V. Ahern, and Richard Thomas. In addition to producing "Omnibus" until 1961, the associates developed and produced many series and special programs. The associates developed a series featuring Leonard Bernstein, who first appeared on television as a teacher and analyst of music on "Omnibus," entitled "Leonard Bernstein and The New York Philharmonic." This series won three Emmys and first prize at the International Television Festival of Monte Carlo. In connection with Leonard Bernstein programs, Mr. Saudek negotiated the contracts with Mr. Bernstein, went over program ideas, participated in the choice of program subjects, and sold the programs to sponsors and networks.

400. Following his appearance in the Army-McCarthy hearings, Joseph N. Welch narrated on "Omnibus" a three-part series on the U.S. Constitution; a two-part series on the "American Jury Trial System"; and the story of his own boyhood. Robert Saudek Associates then chose Mr. Welch to narrate other series, including the "Hour of Great Mysteries," which the associates produced for NBC. Mr. Saudek personally arranged for Mr. Welch's appearances on "Omnibus" and on the "Hour of Great Mysteries."

401. From 1962 until the fall of 1963 the associates were television consultants to Lincoln Center. The associates produced the "Opening Night of Lincoln Center." Mr. Saudek's work with this program was similar to that for the Bernstein series. In 1963 the associates produced "Lincoln Center Day" on the anniversary of its opening.

402. For the National Cultural Center, Robert Saudek Associates produced "An American Pageant of the Arts," a 2-hour closed-circuit program with segments originating from five cities. Mr. Saudek engaged talent, passed on material and talent, and supervised the overall production of the show. He had full responsibility for the preparation and presentation of the show from each of the originating cities.

403. "Report to the Nation: Youth Physical Fitness" was a film produced by the associates and financed by the Equitable Life Assurance Society to publicize President Kennedy's physical fitness program. Mr. Saudek negotiated the contract with Equitable, passed on the script and talent, and planned shooting schedules.

404. "Road to the Wall," a film produced by the associates for the Department of Defense, was nominated for an Oscar. Mr. Saudek passed on the script and talent and secured approval for the film from the Defense Department.

405. In 1963 President Kennedy contracted with the associates to make a 26-week television series from his book "Profiles in Courage." The series was to appear over the NBC network in 1964–65. Mr. Saudek

negotiated the contracts with both President Kennedy and NBC, passed on scripts and talent, and planned shooting schedules.

406. *Preparation and Planning.* Both Theodore Jones and Thomas D. Cabot were interested in the television situation in Boston before they met in November 1962. Mr. Cabot read about the Commission's action awarding WHDH–TV a 4-month license in September 1962. Before meeting Mr. Jones, he discussed applying for channel 5 with one or two members of his family, but he had not given the matter serious consideration before Mr. Jones came to see him. Mr. Jones, on the other hand, had thought about applying for a television station since 1960, when, for his own edification, he first wrote down his ideas on the subject. In 1961 Mr. Jones talked to members of the WCRB executive staff about the possibility of applying for a Boston television station, but did not refer to a particular channel. In September 1962, Mr. Jones read a newspaper article about the Commission's action granting WHDH–TV a 4-month license, and almost immediately decided to apply for channel 5.

407. In October 1962, Mr. Jones began to look for potential investors. He wanted to put together a group of people with money "whom he could seem to trust and feel a kinship with" (tr. 19628). Recognizing his own inexperience in financing new ventures of this scope, he was looking for people knowledgeable in the field. As he went along, Mr. Jones drew up several capitalization proposals without the help of financial or legal advisers. These proposals were all drafted with an eye to keeping WCRB in control of the venture. While trying to form a group, Mr. Jones met the president of the Sheraton Corp., Ernest Henderson, and tried to interest him in Sheraton's joining his venture. Mr. Henderson discussed the possibility of the corporation's participation in an application for channel 5 with Sheraton's board of directors, but the directors were uncertain about Sheraton's chances of winning. Some of the directors also felt that the Sheraton Corp. should not get involved in a fight over a television channel with a newspaper publisher. The directors decided that Sheraton should not participate. But Mr. Henderson told Mr. Jones that if a proposal were presented which "seemed to make sense" (tr. 19894), he would be interested in participating personally "in an amount up to $25,000" (tr. 19894).

408. Mr. Jones continued to meet with possible investors. Among them was David Ogden, a financial analyst for Massachusetts Investors Trust. Mr. Ogden referred Mr. Jones to one of his friends, Thomas D. Cabot. "Being an ardent listener of WCRB" (tr. 20447), he "naturally" agreed to see Mr. Jones. Mr. Cabot met with Mr. Jones on November 30, 1962. Mr. Cabot considered Mr. Jones' financing plans impracticable; he thought that Mr. Jones was naive in financial matters. In the meeting Mr. Cabot suggested the possibility of devoting the profits from the station to philanthropic purposes in New England, one of his major interests. Mr. Cabot testified that he was against trying to gain a large personal profit from a relatively small investment in which he had not "created something for profit" (tr. 20517); and that although he did not criticize others who disagreed with him, "I would not myself want to do it" (tr. 20518). Mr. Cabot's approach interested Mr. Jones. Mr. Jones testified that he wanted to build a

station with high program standards, large profits being of lesser concern. (Mr. Jones is the only subscriber to stock in Charles River who will receive any station profits; he estimated his compensation would be between $65,000 and $75,000 a year. In 1962 he received about $20,000 from WCRB.)

409. Mr. Cabot proceeded to seek the advice of attorneys and tax consultants on organization of the proposed applicant. He wanted the applicant to be organized so that the profits from the proposed station would go to charity only after the full corporate income tax was paid. Otherwise, it was felt, Charles River would have an unfair advantage. Mr. Cabot decided in mid-December 1962, that a venture along the lines he was considering was practicable; details of the organization, however, awaited a later drafting. Mr. Cabot then told Mr. Jones that he would join in the venture. Since Mr. Jones would be doing a great deal of work in connection with preparing and prosecuting the application for channel 5, and because he felt he "had got to keep him interested" (tr. 20338), Mr. Cabot suggested that Mr. Jones' salary arrangement as general manager of the station should include a percentage of the profits. After some dickering over percentages between Mr. Cabot and Mr. Jones, an agreement was executed on December 18, 1962. Mr. Jones and Mr. Cabot agreed that it would be Mr. Cabot's primary responsibility to assemble a group of citizens from the Boston area who would be willing to finance the venture and to handle business details; Mr. Jones assumed responsibility for preparation and planning for the television station. If the application is denied, the stockholders can take their investments as a deduction from ordinary income for tax purposes. Mr. Cabot thought that the Commission would be more favorably inclined toward Charles River because his stock would be turned over to charity.

410. Mr. Cabot had been advised that it would be desirable to have "a larger spread of people, in order to improve the chances of receiving a grant from the FCC" (tr. 20325). He set the original standards for acceptance of associates. He testified: "I was very particular that I have associates that were satisfactory to me. I didn't want to become partners with someone that had a different point of view, a conflict of interest, or would likely make trouble later in running the station" (tr. 20326). Mr. Jones agreed with his criteria, and mentioned "a good many names" to Mr. Cabot, but told him "that he didn't have firm commitments from many of them" (tr. 20327). After Mr. Cabot and Mr. Jones joined forces, Mr. Jones sent a mimeographed letter to all the persons he had talked to about his plans, thanking them for their interest and indicating that he was going to work with Mr. Cabot. (Mr. Cabot "suggested starting fresh and new because in one case my previous group was based on a profit picture; for the investors in Mr. Cabot's group it was not based on a profit picture" (tr. 19272).) Of the people who had evinced some degree of commitment to Mr. Jones' group, Mr. Henderson, Dr. Hoagland, Judge Brooks, Mr. Fuller, and Dr. Paul Samuelson were invited to join the new group; all joined except Dr. Samuelson. For various reasons others approached, including Richard L. Kaye, were not interested to the point of joining; Mr. Kaye, however, served as a consultant and was paid $1,163. Be-

tween December 18, 1962, when the Cabot-Jones agreement was executed, and March 23, 1963, applicant Charles River's organizational structure was completed. Charles River Civic Television, Inc., was incorporated, and between January 25 and March 21, 1963, all the stockholders signed subscriptions for the class A common nonvoting stock. On January 24, 1963, the Indenture of Trust of Charles River Civic Foundation was executed, and between February 25 and March 22, 1963, all the subscribers to Charles River's stock executed option agreements with the foundation.

411. Charles River's proposed programing went through four revisions before approval for submission to the Commission with Charles River's application on March 25, 1963. The first program schedule was prepared by Theodore Jones in consultation with David M. Davis, assistant general manager of WGBH–TV, Boston's educational television station; Richard L. Kaye, vice president and manager of WCRB; Harold Pyke, producer-director at WGBH–TV; and Louis M. Lyons, curator of the Nieman Foundation for Journalism at Harvard University and a news commentator on WGBH–TV. The first schedule was submitted to the principals at meetings of January 15 and January 23, 1963; the second proposed program schedule at a meeting of February 7, 1963; the third to the meeting of February 27, 1963; and the fourth to meetings of March 12 and March 20, 1963. At each of these meetings, those present discussed the proposed schedule, making suggestions based on their general knowledge and experience as well as on talks they had had with residents of the Boston area. The schedules were revised after the meetings to embody suggestions of the principals.

412. Before Charles River's meeting of March 12, 1963, Mr. Jones had suggested employing Robert Saudek. At the meeting, Mr. Jones reported that he had met with Mr. Saudek and discussed the possibility of securing his assistance in developing Charles River's programing. Mr. Saudek attended a meeting of Charles River's board of directors on March 20, 1963, and indicated an interest in the type of programing Charles River was planning. It was agreed at this meeting that Mr. Saudek would review Charles River's program proposals and that if he and Mr. Jones felt that their aims were compatible he would become associated with the group.

413. A fifth program schedule, revised by Mr. Saudek and Mr. Jones, was submitted to the principals for discussion on April 22, 1963. Mr. Saudek outlined his philosophy of flexible programing and then went over the programs which he had developed especially for the schedule, such as "Omnibus, Jr." and "Evening Watch." (See below.) The group discussed the programs which had not been on previous schedules or had been revised. Proposed program schedule No. 5 with an amendment was then approved for submission to the Commission as Charles River's final schedule. Charles River did not work out a rate card in connection with formulating various budgets, nor did it consider whether to charge less than WHDH; it assumed that since WHDH made a profit, it would too.

414. Charles River conducted interviews with community leaders and representatives of many organizations in the Boston area. A con-

tact questionnaire was distributed to the Charles River principals at their January 15, 1963, meeting; they were told that it was to be used as a guide. They were also told that if any of the questions suggested other areas of exploration, they should not feel bound by the questionnaire but should try to get all information which might be helpful for programing. Charles River also contracted for a telephone survey.

415. Charles River introduced into evidence summaries of 156 programing interviews. They fill an exhibit volume 2 inches thick. These summaries were prepared for exhibit purposes by Charles River's counsel and Miss Roper, Mr. Jones' secretary, and are not a complete account of the interviews but a selection from them. The exhibit does not contain a transcription of the interviews, but recounts in general fashion the topics discussed in a particular session and in some detail the interviewer's conclusions from the conversation (or correspondence). In several instances there are grounds for suspecting that the interviewer's conclusions may be a tendentious construction of the respondent's remarks, or that the interview itself may have been more perfunctory than the exhibit implies. The interviews spanned the period between December 11, 1962, and June 21, 1963, with most between January and April 1963. Charles River's principals conducted 144 of the interviews, in some cases, as above indicated, by mail; 12 were by others under the supervision and direction of Mr. Jones. Among those interviewed were leaders of civic, business, social, and youth organizations, housewives, and retired persons. People interviewed were interested in such fields as business, manufacturing, law, medicine, architecture, religion, education, banking, labor, military, science, engineering, and the arts. Interviewees lived in or represented organizations from some 30 of the communities within Charles River's viewing area, including both high and low rent districts. In addition, Charles River made a telephone survey which included some 600 telephone interviews with people chosen haphazardly from the Boston area.

416. Mr. Jones testified that Charles River was "interested in ideas, opinions, [and] feeling[s]" of the respondents, and not in statistical majorities or minorities (tr. 18584). He testified, however, that statistics did influence Charles River to increase the amount of its news programing. There was also generalized and unenlightening testimony by Mr. Jones that "several programs were enriched, added or changed because of this compilation" (tr. 18236), but although he reiterated that "it affected our program plans," he could not "point to a specific conscious change because of a statistical figure"; he felt that "the statistical total affected our thinking," but again could not "point to a direct result from that statistic and figure" (tr. 18252–53). In its step I proposed findings, however, Charles River cites instances of program development. They will be described in succeeding paragraphs.

417. "Golden Rule" is a proposed live religious program and scheduled for Saturday, 5:30 to 6 p.m. In tentative program proposal No. 1, "Interfaith Discussion" had been scheduled for Tuesday evenings, 7:30 to 8 p.m. Before submission of No. 1 to the meeting of January 15, 1963, the schedule was revised to one program a month for "Interfaith

Discussion." At the meeting Mr. Jones explained that the program would bring together students and clergy of various faiths to discuss religious or secular subjects. Proposed program schedule No. 2, submitted at the February 7, 1963, meeting, scheduled "Interfaith Discussion" for Saturdays from 12:30 to 1 p.m. "Mr. Jones explained to the group that on the basis of suggestions made by the principals and interviews with people from the religious world, it was decided that the program could be put on weekly. He added that the people interviewed had indicated to him that the program should not be scheduled on Sunday and Mr. Jones suggested the 12:30 p.m. Saturday time" (exhibit 20, p. 20). Mr. Sonnabend, Dr. Hoagland, David B. Stone, Judge Brooks, and Mrs. Perkins commented on the proposal. When proposed program schedule No. 3 was submitted to the meeting of February 27, 1963, Mr. Jones explained that to incorporate suggestions made at the previous meeting the program, now called "Religious and Interfaith Discussion," had been rescheduled for 5:30 p.m. on Saturday, and the format had been changed to include discussions on specific religious and histories as well as interfaith discussions. The proposed program went through minor revisions at later meetings, particularly in a change of name to "Golden Rule."

418. Mr. Cahners suggested the possibility of telecasting concerts of the Boston Symphony at the meeting of the principals on January 15, 1963. Charles C. Cabot was authorized to meet with the president of the symphony's board of trustees. On January 28, 1963, Mr. Jones interviewed Thomas D. Perry, manager of the symphony. Mr. Jones concluded from Mr. Perry's comments that Mr. Perry "felt these were major problems to overcome but that he and the Boston Symphony would be willing to help in the development of new approaches to such problems" (exhibit 36, p. 122). Mr. Jones added Boston Symphony concerts to proposed program schedule No. 3, submitted at the meeting of February 27, 1963. "Charles C. Cabot indicated that he would follow up on the matter with Henry B. Cabot, president of the board of trustees on the symphony, and Mrs. Perkins, who is a trustee of the symphony, indicated that she would also talk to him" (exhibit 20, p. 16). The Friday afternoon concerts of the Boston Symphony Orchestra have been included in Charles River's final proposed schedule. (See par. 445 below.)

419. "College Focus" was added as a Sunday afternoon show to proposed program schedule No. 2, considered at the meeting of February 7, 1963. Mr. Jones said at the meeting that he had added the program as a result of talks with college professors and other educators, including President Nathan M. Pusey, of Harvard, and the Very Reverend Michael P. Walsh, S.J., president of Boston College. David B. Stone suggested that the program include news of college events open to the public, and Robert B. Stone that the announcements be made reasonably far in advance. "College Focus" is included in the final program schedule as a feature on "Evening Watch," an hour program, Monday through Friday at 6 p.m. At the meeting of February 7, Mr. Robinson suggested that a program about business be added. Mr. Sonnabend said that the program could include filmed tours of various businesses. Mr. Jones said that programs were available from

the NAM and from labor unions, but Mr. Sonnabend was against the use of these films. He said that there should not be a "partisan approach to business matters; that the viewpoints of business and labor should be combined in one program, not presented in separate programs. The ideas developed by this discussion eventually were used in the program 'Labor-Management Public Forum,' 7:30 to 8 p.m., one Thursday [a] month" (exhibit 20, p. 15). Mr. Jones had also, on April 11, 1963, interviewed John W. Church, director of the American Arbitration Association's Boston office, and Donald C. White, professor of economics at Boston College and a professional arbitrator. (Charles River also asserts, but without documentation beyond reference to an interview with Prof. Sheldon Glueck, of Harvard Law School, and some opinion testimony of Mr. Jones, that the programs are educational, that " 'Liberty Tree and X-Ray New England' * * * were developed partly in response to requests in the interviews for educational programs in prime time. While these programs may not meet the Commission's definition of educational programing, interviews such as that with Professor Glueck indicated that educational programing should be very broadly conceived" (step I, par. 246).

420. Charles River declares that it "plans to adopt other suggestions which were made by people interviewed." In asserted illustration of its intentions it writes (step I, par. 247), for example (though it offers no citation supporting the use of the exhibit and testimony as an example rather than as an isolated instance without congeners), that "Mr. Henderson and Mr. Jones concluded that Robert S. Sturgis, chairman of the Committee on Civic Design of the Boston Society of Architects, would welcome the help of television in furthering the work of the civic design committee. Charles River will work this subject into the program 'Glamour.' Other specific suggestions will be worked into such programs as 'Glamour' and 'College Focus' (exhibit 34, pp. 14, 15; tr. 19023–24)." It should be noted that exhibit 34, pp. 14 and 15, is a summary of the interview with Mr. Sturgis, and that at tr. 19023–24, and actually continuing into 19025, Mr. Jones, among other things, testified only in general fashion to a specific question: "It is my independent recollection, sir, that I read these interviews and provided for them in the different programs we planned. One of the programs I thought important as civic design ideas of Sturgis' was 'Glamour.' I can't remember more details."

421. Mr. Henderson testified to attendance at meetings of principals where programing and the Charles River policy statement were discussed. He said (tr. 19929) that "the program schedule * * * has been largely in the hands of those who are more familiar with [preparation of the proposed program schedule] than I am." It was stipulated that "any findings of fact which the Commission can properly make on the basis of Mr. Henderson's * * * testimony [at tr. 19833–20126] with reference to his participation in, and knowledge of the preparation, planning, budget and proposed staffing, programing and operations of Charles River Civic Television, Inc., with reference to his knowledge of, and experience with, the operation and programing of existing television stations, and (with the exception of Norman L. Cahners) with reference to the manner and extent of his participation

in the management or operation of the television station proposed by Charles River Civic Television, Inc., can likewise be made with reference to: Lawrence G. Brooks, Charles C. Cabot, Norman L. Cahners, Ray J. Heffernan, Hudson Hoagland, Dwight P. Robinson, Jr., Roger P. Sonnabend, Robert G. Stone, David B. Stone, John J. Wilson" (tr. 20552). It was Mr. Henderson's "understanding that the directors will establish guidelines and that they will leave considerable discretion to both Mr. Jones and Mr. Saudek, between them, as to carrying out the general policies" (tr. 19957). All principals, except Mrs. Lombard, participated in program discussions at meetings.

422. *Policy Statement.* After the Charles River group was formed, Mrs. Perkins proposed a "written draft of goals" (exhibit 20, p. 22). It was circulated to all the principals and discussed with members of the executive committee. Mr. Saudek explained his "television philosophy" to the principals (p. 22). Mr. Jones and Mr. Saudek later revised the Perkins draft and submitted it to principals at the meeting of January 20, 1964. There was a group discussion of the revised draft. A final draft was submitted to the principals at the meeting of February 14, 1964, several months after the case was designated for hearing, and was approved except for minor editing. Mr. Henderson, however, testified that he had not "specifically voted on it" (tr. 19949); by stipulation this finding also applies to 10 other principals making up a majority of the board.

423. In the policy statement, called its "philosophy" (exhibit 21), Charles River expresses its belief that television "offers tremendous opportunity for creative expansion and more mature programing." The "basic principles" which it states will govern its operation are:

1. To develop new concepts in television programing.
2. To seek out creative talent and offer full use of the station's facilities as a showcase for this talent.
3. To provide a television workshop for the development of new programs and a system for testing some of these programs before adding them to the program schedule.
4. To establish and maintain a resident repertory company and to present plays and programs of the arts.
5. To spur the creative imagination of children and adults and to encourage active participation as opposed to passive viewing.
6. To present accurate and unbiased news reports, presenting the other side or the minority view whenever possible and striving for greater news in depth coverage of the more significant stories rather than just superficial coverage of all items.
7. To provide a local forum for responsible differing viewpoints.
8. To provide a forum for candidates for local, state and national office and where practicable to make these forums available to the candidates free of charge.
9. To bring community problems to the attention of the listening audience, to suggest possible solutions and to encourage community action for accomplishing these solutions.
10. To encourage educational, cultural and other community organizations to use its facilities and to extend to them professional assistance in the production of programs.
11. To make available to its service area worthwhile nonnetwork programing developed by local television stations in the United States and by foreign television stations.
12. To follow the NAB television code as a minimum standard for programing and advertising.

13. To have its programing and advertising standards administered by its programing department and not its sales department.

14. To allocate its profits to charity after presenting the very best programs possible.

It promises to scrutinize programs involving violence and to consult authorities on youth programing; and to try to improve on present standards relating to the substance, length, sound, frequency, and interruptions of commercials. It says that it will follow the NAB code for advertising and programing and from time to time will set more stringent standards.

424. On March 12, 1963, Charles River's board of directors, at Mr. Cabot's suggestion, approved the tender of an offer to WHDH, Inc. if Charles River is the successful applicant. (If its offer is turned down it would build its own plant and studio.) The prospective offer provides that Charles River will buy the real and tangible personal property of WHDH, Inc., and accept from it assignments of leases, contracts and agreements, for a total price of not more than $5 million. Included in the offer is a recital that Charles River will "employ the great majority of the personnel of WHDH, Inc. who are employed in" its television operations (exhibit 20, app. A). Apart from the possible use of WHDH's plant, Charles River proposed no auxiliary power generators for either transmitter or studio operation, and no alternative transmitter, microwave, or other equipment to insure operation during a power or equipment failure. In connection with its program preparation Charles River made no sketch of its proposed studio space, nor did it have any information of WHDH's studio plan. Its equipment proposals for program production were made without a floor plan of its proposed studio space.

425. Charles River intends to establish a television workshop of writers, artists, researchers and directors, suggested by the Omnibus group. They will be urged to develop creative and entertaining programs. Charles River will work with institutions like the radio and television schools of Boston University and Emerson College, the New England Conservatory of Music, the DeCordova Museum, the Longy School of Music, and the Museum of Fine Arts, to discover new talent. It plans to test certain new programs by tryouts and previews before regular scheduling. It will telecast network color programs, and local film and live programs in color "when it will enrich the program fare" (exhibit 21, p. 6).

426. Charles River intends to develop flexible programing to enable it to give special attention to program features within a fixed time period. For example, "Evening Watch," from 6 to 7 p.m., Monday through Friday, will include up to 10 features, with their length determined each day. "Glamour," a morning program for women, and "Omnibus, Jr.," a variety show for children, are among other programs which will have a flexible format.

427. Charles River will affiliate with a network, but when local or special events occur which call for prime time, or when there is a local program of importance to the Boston area, Charles River says that it will preempt a network program.

428. One of the Charles River group, a doctor, recommended against carrying cigarette advertising, suggesting that "serious thought be

given to the whole issue" (tr. 18816). A consideration that led to rejection of this proposal by the majority was the effect of a ban "on a network affiliation agreement" (tr. 18816). Mr. Jones testified that he had proposed "several commercial ideas * * * about stringent standards" but that the group's "feeling was to go slow and easy and prove the feasibility of what I was doing as I went along" (tr. 18553). At a meeting of the Charles River principals on March 12, 1963, Mr. Jones submitted a memorandum entitled "Suggested Commercial Advertising Standards." Par. 1 of the memorandum provided:

"We will limit our commercial messages to approximately eight per hour, or a total of approximately 750 commercials per week and about 250 sustaining spots per week." The group changed this to a limit of three commercials every 14½ minutes and 750 commercial spot announcements a week. Additional suggestions which the principals after discussion declined to adopt were: "We will interrupt programing less often for commercials than is the current custom"; and "In regular programing, we will refuse to triple-spot. That is, we will not put three 1-minute spots back to back." Other standards proposed in Mr. Jones' memorandum but rejected by the group included: "During as many prime evening hours as possible, local commercial spots will be held to a maximum of 30 seconds length" and "Beer and wine and cigarette commercials will not be shown during nonschool hours except after 9 p.m."

429. In addition to its regularly scheduled public affairs programming, Charles River will from time to time center its attention on problems which can be attacked by community action. Charles River will assist community organizations in the development of local shows, working closely with local educational, cultural, and community service groups.

430. Charles River will editorialize regularly on issues of importance to the Boston area and will "affirmatively seek and present opposing views" (exhibit 21, p. 9). (See, however, par. 236, above, and par. 453, below.) Whenever practicable, it will provide full coverage of events like Presidential press conferences, United Nations discussions, and congressional hearings. It will have a full-time reporter assigned to cover events in Washington, D.C., who will regularly report on New England people as well as on Washington news as it affects the Boston area. There will also be a roving correspondent assigned to travel throughout the United States and in other countries to cover significant news events and report on items involving New Englanders.

431. Charles River proposes to give 3 to 6 months' leave to selected staff members, at the end of a fixed period like each 5 years of service. During these sabbaticals the staff member would be expected "to pursue a field of special interest chosen by the staff member in consultation with station management" (exhibit 21, p. 10).

432. The statistical breakdown of Charles River's program schedule for the proposed typical week is:

	Percent
Entertainment	62.0
Religious	2.5
Agricultural	0.4
Educational	6.2
News	13.2
Discussion	3.6
Talks	12.1
Total	100.0

433. Charles River's analysis of its program schedule by source for the proposed typical week is:

	8 a.m. to 6 p.m.	6 to 11 p.m.	All other hours	Total
Network commercial	60.1	80.7	1.1	55.0
Network sustaining	2.2	None	10.7	3.1
Recorded commercial	5.6	2.8	35.6	10.3
Recorded sustaining	1.8	None	6.0	2.1
Wire commercial	None	None	1.1	0.2
Wire sustaining	0.2	None	4.0	0.8
Live commercial	17.9	8.1	39.5	19.2
Live sustaining	12.2	8.4	2.0	9.3
Total commercial	83.6	91.6	77.3	84.7
Total sustaining	16.4	8.4	22.7	15.3
Complete total	100.0	100.0	100.0	100.0
Broadcast hours	70	35	23⅓	128⅓
S.A.	435	195	120	750
N.C.S.A.	120	50	80	250

434. A short description of Charles River's nonnetwork programing, which constitutes 41.9 percent of its proposed typical week, follows under appropriate headings.

435. *Children and Young Adults.* "Omnibus, Jr.," 7:30 to 9 a.m. on Sunday, is a variety show for children patterned after the Omnibus series. "Omnibus, Jr." will be produced for children between the ages of 7 and 14. There will be nature films, with particular emphasis on the flora and fauna of New England; dramatic readings from children's books and the Bible; live music each week by solo performers; occasional visits to a Boston youth symphony; and readings of excerpts from famous American diaries, speeches, or books. Unidentified characters from great literature will be introduced and small prizes awarded to the children who write in with the correct identification together with the most interesting and original descriptions of the characters. There will also be excerpts from children's plays and features on famous New Englanders when they were children.

436. "Rise and Shine," 9 to 10 a.m., Monday through Friday, is intended to broaden the horizons of the preschooler. Through conversations with make-believe characters like Raggedy Ann and Andy, a teacher will bind the program together. The teacher will read from children's books and tell stories about nature and wildlife, pets, policemen, and spacemen. The program will also include music, dancing, films, plays, and puppet shows. All material, including the advertising, will be screened by the teacher.

437. "Five O'Clock Watch," 5 to 5:30 p.m., Monday through Friday, is an entertainment program for children between 6 and 12. A couple from the Boston area with performing talent will emcee the program. Children will be invited to the studio, where they will play games, engage in contests, and sing. Children with hobbies will be asked about their special interests and collections. The program will have a pet mascot, and the relationship of care and feeding to its growth will be shown daily.

438. "Young Editors," 5:30 to 6 p.m., Monday through Friday (except for Friday during the 24 weeks of the Boston Symphony Orchestra), is for teenagers. Editors, reporters, writers and cameramen on school papers, 13 to 17, will be selected from the secondary schools around Boston to appear on the show. A host will be chosen from among the participants each day to handle interviews and moderate discussions. These might cover sports, current controversial issues, education, art, and music. Short films will be shown and discussed by the young editors. A young critic will introduce entertainers from local schools or excerpts from school plays. Coaches will interview school lettermen.

439. "Five O'Clock Quiz," 5 to 5:30 p.m., Saturday, will feature teams of students representing area high schools. Each week's quiz will deal with a particular subject.

440. "Back Bay Blast," 11:15 p.m. Saturday to 1 a.m. Sunday, is an entertainment program for older teenagers and college students. It will feature live entertainment—jazz combos, folk singers, folk dancers, college and high school dance bands, young comics, singers, and other performers. Some programs will originate from the station and others from dormitories, gyms, dining halls, or coffee houses.

441. "Youth Concerts from DeCordova Museum," 11 a.m. to 12 noon one Saturday a month, will present the winter concerts at the DeCordova Museum in Lincoln, Mass., under the direction of Kalman Novak, conductor of the Civic Symphony Orchestra of Boston. Mr. Novak works with school departments and music teachers in preparing these concerts. Once a year talented children from area elementary schools join the orchestra in a special number. This performance will be presented as part of the televised series.

442. *Women's programs.* "Glamour," 10:30 to 11:30 a.m., Monday through Friday, is a program for housewives. A well-known personality from the Boston community will be the host. Regular features will include book reviews, shopping tips, reports on women in the news, and fashion shows for women of all ages. Bridge and fashion experts, family counsellors, clergymen, foreign students, painters, poets, actresses, and career women will be guests. There will sometimes be remote broadcasts from the arts festival or the flower show, or from a local museum, college, or famous New England home. "Profile of a Woman" will be a special feature. The subject will be chosen for her accomplishments in business, the arts, politics, or homemaking. The emphasis will be on women from the Greater Boston community; when possible the subject will be a guest on the show. "How To Build a Library" will be a weekly feature in which there will be reports from famous women's home libraries. A regular segment of the program will be a discussion of problems of the modern woman; viewers will be asked to send in their opinions on the subjects discussed and to suggest others.

443. *Public affairs programs.* "The Liberty Tree," 7:30 to 8 p.m. on Monday, will feature discussions of current social, economic, and political issues. Where the topic involves conflicting views of special interest groups, a spokesman for the general public will be added to the panel. Topics will be presented through case histories, video tapes

of on-the-street interviews with members of the public, or excerpts from meetings or hearings. When the importance of an issue or the presentation of all responsible viewpoints warrants it, a series of programs involving the issue will be broadcast. "Labor-Management Public Forum," 7:30 to 8 p.m. one Thursday a month, will deal with problems and policies in the labor-management field and their effect on the community. The program will present the views of labor and management as well as those of the general public. In the presentation and development of this series, the station intends to work with the American Arbitration Association, local labor unions, chambers of commerce, the New England Council, research groups, and other civic organizations. Special programs will be inserted in prime time when issues of extraordinary interest and importance arise which cannot be adequately treated within the framework of Charles River's regularly scheduled public affairs programing. At election time, blocks of time will be set aside for candidates for major offices. When the number of candidates for a major office is not unwieldly, they will be given a chance to appear without charge to debate opponents on special forum-type programs.

444. *Community and area affairs programs.* "Yankee Journalist," 1:10 to 1:30 p.m., Monday through Friday, will feature a "colorful and wry commentator" (exhibit 24, p. 13). He will question people in the news, look at the way different newspapers or magazines cover important stories, comment on television programs; moderate short informal discussions on controversial events in the Boston community, and work with local schools and colleges to present various aspects of academic life. "Spirit of '76," 11:30 to 12 noon every other Sunday, will draw on the local news, activities, and interests of Boston area communities. A host will conduct the program, with mayors, selectmen, teachers, librarians, and other civic personalities participating. The program will feature the activities of scouts, civic clubs, twilight leagues, and schools, and will present social notes, vital statistics, reviews of local productions, reports on men and women in the community, and townhall gossip. On occasion it will include vignettes based on the recollections of a town's old-timer or from books, dramatized with photos of old and new landmarks, maps, and other documents. "V.I.P.'s," 6 to 6:30 p.m. Saturday, will feature interviews of important people who have some connection with the Boston community. "X-ray: New England," 8:30 to 9 p.m. one Wednesday a month, is a documentary program which will survey various aspects of life in New England. For example, programs will deal with subjects like the history, economic structure, and importance to individual communities of various New England industries; the effect of the tourist boom on Cape Cod's traditions and economy; and the impact of the construction of Route 128 on the industrial development, politics and people in the communities it girds.

445. *Drama and the Arts.* "Arts Festival," 4:30 to 5:30 p.m. Sunday, will devote one program monthly to the production of a classic or contemporary play; another to a filmed drama; a third to excerpts from New England productions, followed by discussions with the participants; and a fourth to music or the dance, including such New

England festivals as the Boston Arts Festival and the Jacobs Pillow Dance Festival. Charles River will use writers, directors, and actors from its television workshop and from its resident repertory company for this program as well as program material and creative talent from the Greater Boston area. In addition to complete dramatic works, there will be individual dramatic performances and readings from plays and poetry. (Charles River writes (exhibit 24, pp. 17–18): "The plays we will want to produce fully will be drawn from such a list as this: Strindberg, 'The Father'; O'Neill, 'Emperor Jones'; Buchner, 'Wozzeck'; Beckett, 'Happy Days'; Osborne, 'Epitaph for George Dillon'; Sheridan, 'The Critic'; Shaw, 'Arms and the Man'; Albee, 'The American Dream.'") Charles River will sponsor an annual little theater drama workshop festival for theater groups from the station's service area, with the winner or winners of the competition appearing on the program. When it is felt that the 60-minute format would be too short to do justice to the work presented, the program will expand to 90 minutes (from 4 to 5:30). Boston Symphony will feature the Friday afternoon concerts of the Boston Symphony Orchestra live from Symphony Hall from 2:15 to 4:15 p.m. during the orchestra's 24-week season. "Boston Symphony Lead-In" will be presented from 2 to 2:15 p.m., just before the concerts. The host will be a musical educator from the Boston area who will discuss the selections on the concert to follow. At times, the program will show how the orchestra prepares for a concert, or move backstage for interviews with the musicians. Charles River's expectations that it will be able to broadcast BSO concerts is based on WCRB's long experience with the orchestra and on information Mr. Jones had obtained from Mr. Kaye. Mr. Jones testified (tr. 20276): "He [Mr. Kaye] told me that Mr. Kraut [assistant to the BSO manager, Mr. Thomas D. Perry] would be willing for us to make a live broadcast of the Boston Symphony on Friday afternoons in return for a good, clean video tape of the concert and that it was to be definitely understood that they were sustaining programs and not commercial programs." (From a letter of Mr. Perry, dated April 28, 1965, addressed to the Hearing Examiner and distributed by him at the hearing to all counsel, it appears "that the Boston Symphony Orchestra views with great interest and sympathy the application of both" Charles River and BBI, and that BSO "would take the same attitude toward, and offer the same terms for broadcasting to, any group.") If BBI, which doubts the ability of Charles River to secure live BSO broadcasts on the fairly easy terms it states, wished to settle the matter beyond dispute, it could have called Mr. Perry and asked him for a gloss on his letter, but it did not do so. There is less assurance, however, that the BSO would favorably regard the proposed sponsored lead-in program. Mr. Jones testified (tr. 18015):

Q. Have you checked with the Boston Symphony Orchestra as to whether they would have any objection to whether the lead-in would be sponsored by someone?
A. Yes, sir.
Q. Have they indicated their opinion on that?
A. No objection.

Q. Whom did you talk to?
A. Mr. Perry, in general, but I am basing my answer on how we handled the Boston Symphony at WCRB.
Q. You didn't ask Mr. Perry specifically?
A. No, sir.

446. *Education.* "Books, Books, Books," 10:30 to 11 a.m. on Saturday, will have authors who will discuss their writing and guests who will present their personal views on particular books. A regular host will be chosen from one of the educational institutions in the Boston area. He will analyze trends on the best seller lists, offer brief book reviews, and read timely and interesting excerpts from old and new books. From time to time an entire program will be devoted to the works of a single author. "Wonderful World of Science," 11:30 a.m. to 12 noon every other Sunday, will be planned and produced in cooperation with the science departments of local universities and museums. It will focus on newsworthy scientific developments, especially those originating in the Boston area. BBI notes (step II, p. 110) that although Charles River has declared its intention to preempt network time in favor of an important local program, Mr. Cabot testified that "we have relatively few local programs during prime time" (tr. 20360); and that Mr. Jones could point to no program in prime time which the Commission would classify as educational. In an attempted reply to this criticism, Charles River (step III, Reply Findings, p. 90) refers to Mr. Jones' testimony (tr. 18593–4) "that in terms of his definition of educational programs rather than the strict FCC definition of the term, the educational programing in prime time proposed by Charles River consisted of the "Liberty Tree" and "X-Ray": New England [see above] * * * In support of his broad concept of educational programing, Mr. Jones discussed a programing interview he conducted with Dr. [Sheldon] Glueck [professor of law at Harvard], who had indicated to Mr. Jones that in order for educational programing to get across, it had to be entertaining, and not academic or pedantic."

447. The 6.2 percent of the proposed Charles River typical week which it classes as educational apparently include the 2¼ hours of the Friday "Lead-In" and "Boston Symphony Orchestra Concerts." BBI writes (step II, p. 113): "This gives a BSO total of 3,240 minutes a year, or an average of 62 minutes a week, which is about 1 percent of the total broadcast time during the proposed typical week. The BSO programs are classified as educational because the Boston Symphony Orchestra during the summer maintains a school [official notice is taken that the school is at Tanglewood in the Berkshires] (tr. 18034). The argument is ingenious but hardly convincing. If accepted, many programs now clearly falling within other categories would automatically become educational because there are many companies and organizations connected with programing a minor part of whose activities consists of instruction of some sort." Charles River replies (step III, Reply Findings, p. 92): "The BSO programs are classified as educational because the Boston Symphony Orchestra during the summer maintains a school and because Boston considers it an educational organization (tr. 18034)." (This reply, however, is a distortion

of Mr. Jones' testimony at the transcript reference. He testified: "Well, it seems to me that Boston considers it an education[al] organization. They have a school every summer.") Now, it is obviously absurd to judge the attractiveness of a program by its conformity with a Commission definition. The public enjoyment of a concert by the great Boston Symphony is not enhanced or affected by a definition. Nevertheless, for whatever formal value it has at this point, it must be found that the BSO programs are "entertainment"—of a very high order, it is true—and not "educational" merely because the orchestra maintains a summer school. In the latest WCRB renewal application Mr. Kaye classified the BSO concerts as entertainment, but Mr. Jones thought the classification "debatable" (tr. 19213).

448. *Religion.* "Golden Rule," 5:30 to 6 p.m. on Saturday, will alternate weekly between panel discussions of contemporary subjects and illustrated highlights of the history of religion. On the panel program guests will be asked to express their views on the moral and spiritual values involved in various areas of current behavior. On the alternate week program the host will take viewers to a great church or shrine in the United States, France, or Italy, and describe its history; show religious films and discuss excerpts from them; visit a charitable institution or hospital; or discuss with guests a piece of art, music or poetry inspired by religion. There will be programs devoted to great religious leaders, to great religious books, and to comparisons of different religious philosophies. Occasionally, the same subject will be discussed on the panel 1 week and dramatized the next. Charles River, in "Inspiration," will close each broadcast day with quotations selected from the sacred books of the world's religions and from historical figures. Charles River says (exhibit 21, p. 11) that "Care will be taken in the allotment of time to specific religious groups to make sure that there is a fair division among the various religious persuasions in our listening area." No allocation has yet been made, though Mr. Jones has discussed the matter with his principals. He said (tr. 19478): "I don't know that we discussed it in terms of percentages. We have discussed it in terms of fairness."

449. *News programs.* Charles River's own news program will cover local, national and international developments, and are scheduled so as to supplement and amplify the regularly scheduled network news shows. In addition to the news portions of "Evening Watch" (see below), Charles River has scheduled four news programs daily, Monday through Friday. These are "Morning Watch," from 7 to 8 a.m.; "News and Weather," from 1 to 1:10 p.m.; "Eleven O'Clock News," from 11 to 11:30 p.m.; and a "News Wrap-up," from 1 to 1:08 a.m. During the 24 weeks of the "Friday Boston Symphony Orchestra Concerts," an additional news program has been scheduled from 4:15 to 4:30 on Friday. On Saturday there are also four regularly scheduled news shows: "News Summary," from 8:45 to 9 a.m.; "News, Weather, Sports, Commentary," from 6:30 to 7 p.m.; "News, Sports, Weather," from 11 to 11:15 p.m., and "News Final" from 1 to 1:08 a.m. On Sunday "News Review" is scheduled from 12 noon to 12:15 p.m.; "Boston Calling Washington" from 12:15 to 12:30 p.m.; and "News Final" from 1 to 1:08 a.m. "Morning Watch," 7 to 8 a.m., Monday through

Friday, will furnish a rundown of international, national and local news, sports and weather, repeated in three 20-minute cycles. There will be features, as well as religious news and business and farm market reports. There will be eye-witness reports of local events of the night or early morning before, audio-recorded by roving reporters and supplemented by still photographs or film taken at the scene. A regular feature will be video-taped highlights from the discussion and interview programs of the day before. "News Review," 12 noon to 12:15 p.m. on Sunday, will be a review of highlights in the local news from the preceding week, interspersed with background information and commentary. "Boston Calling Washington," 12:15 to 12:30 p.m. on Sunday, will feature news of political, economic and social developments in Washington of particular significance to the Boston community and New England. For this program Charles River will have a full-time reporter on its staff assigned to Washington. He will frequently interview prominent Massachusetts citizens working in Washington.

450. To supplement its regular news staff Charles River proposes to organize a system of stringers. It plans to consult specialists for background commentary. Remote equipment will be used for on-the-spot coverage.

451. *Evening Watch.* "Evening Watch," 6 to 7 p.m., Monday through Friday, includes 10 program features. Two, "New England News and Weather," will be presented each night, Monday through Friday. Other features will be carried periodically and will vary in length. A description of these features, other than "New England News and Weather," which are self-explanatory, follows.

452. "Under the Golden Dome" will present the reports of staff men assigned to the Massachusetts State House and the Boston City Hall. In addition to reports there will be interviews with key officials and figures in State and city news. "Fair Comment" will feature the personal views of professionally-qualified men and women on contemporary developments in various fields, including world affairs, science, education, and the arts. "Business World" will carry reports and analyses of commerce and industry, both regional and national. "What's the Score" will be a roundup of the scores of local and national games and other sports news. Editorials is the program on which Charles River will present its view on contemporary issues of community importance. It will affirmatively seek out and present opposing viewpoints on this segment of "Evening Watch." It will also at times synopsize editorials from the country's major newspapers. There has been mention of the opinion of counsel on the relation of the Internal Revenue Code to the operation of Charles River, as all its stock would be held by the foundation. The opinion, dated March 20, 1963, was signed jointly by Charles River's local counsel and its communications counsel. While the provisions of the trust indenture barring all propaganda or attempts to influence legislation is more restrictive than the tax law, the legal opinion deals with the extent to which the corporation, and not the foundation, may editorialize. It is Charles River's position that restrictions on the foundation under its trust indenture do not apply to the corporation operating the television station; and

that to avoid endangering the tax-exempt status of the foundation the corporation (Charles River) need only comply with the Internal Revenue Code and not with the more restrictive provisions in the indenture of trust. Charles River declares that the Internal Revenue Code does not prohibit a station controlled by an exempt organization from presenting programs on which candidates appear. The legal opinion on the scope of Charles River's activities in political campaigns states only that the station should be "scrupulously fair in seeing to it that any broadcasts with respect to candidates are conducted in strict accordance with the law, that the programs are undertaken entirely in the public interest, and that the station itself does not participate or intervene in a political campaign on behalf of or in opposition to a candidate for public office."

453. Charles River proposes to offer candidates for major elective offices the opportunity to appear on a series of prime time forums, without charge if the number of candidates is not excessive. As to supporting or opposing legislation, Mr. Jones testified that Charles River could editorialize on matters like segregation in Boston, Mass., constitutional reform, Boston housing and redevelopment, the transit authority, and the expenditures of city or State government. The legal opinion referred to above declares that the station may editorialize on such subjects even though legislation might be influenced, as long as this does not constitute a substantial part of the station's activity. Mr. Jones conceded that there would be a limitation on the time Charles River could devote to "controversial questions which are somehow legislatively related; in other words, are tied in with pending legislation or suggested legislation," and that this limitation is "greater than would apply to a normal television station" (tr. 20228). Counsel's opinion recommended that in a 16- to 18-hour broadcasting day, editorials should occupy not more than 15 minutes; but that in the case of education and other public service programs, if the station is not itself adopting an editorial position, as much as an hour or two might be devoted to them without running afoul of any applicable rules of the Internal Revenue Service. Mr. Cabot was of the opinion that the station would "not support or oppose legislation" (tr. 20356). He felt that most "editorial positions * * * might have some impact on possible legislation" (tr. 20472). Mr. Jones would initially decide whether a particular subject is a proper one for an editorial; if he had any doubts he would take the matter up with Mr. Cabot. Charles River did not disclose any plans for specially trained editorial personnel.

454. Mr. Cabot testified that if a proposed editorial did not have the unanimous support of the directors, there might be a tag line attached stating the fact. But he said that unless "this division became a matter that we could not very well overlook" there would be no notice of it, since "some members of this board have other forums in which to present their views" (tr. 20482). Both Mr. Cabot and Mr. Henderson recognized that the editorial position of Charles River would of necessity represent the views of the majority of the board, and both indicated that if they disagreed with an editorial they might

simply take steps to assure that their positions were also presented on the station.

455. "Theater and Arts" will feature interviews with personalities visiting Boston. There will also be brief reviews of plays and films. When a particular work evokes a diversity of critical opinion, the discussion format will be used. The "Four Seasons" will be a program for active sportsmen as well as for those who might be induced to become active. There will be news and advice on sports of the season. "College Focus" is a report on the colleges and universities in the Boston area. Various aspects of academic life would be featured—a moot-court competition from a law school, an anatomy class from a medical school, or a literature seminar from a liberal arts school.

456. *Sports programs.* "Area Sports Feature Highlights," 12 noon to 1 p.m. on Saturday, will be a wrap-up of the preceding week's local professional, college, and high school contests. "Highlights" will be on film and video tape, with key participants providing an audio-taped description of the action shown. "Sports Clinic," from 1:30 to 1:45 p.m. on Saturday, will preview the coming week's area high school, college, and professional games, and will feature interviews with coaches, players, and other sports figures. Sometimes Charles River will use its remote or video-tape facilities to show a team preparing for a game. *Sports Reports.* Charles River plans to give time on all its news shows for the latest sports reports. In addition, when possible, it will bid for the right to televise the games of local professional teams.

457. *Films and Reruns.* Charles River will have a "Late Show" at 11:30 p.m., Monday through Thursday. It plans, when possible, to have each week's movies center on a particular theme, and to have the pictures introduced by an emcee. It also proposes to spot commercials so as to interfere as little as possible with the story line. Every Friday and Sunday night there will be a foreign film—if in a foreign language it will be dubbed or have English subtitles. On Sunday mornings there will be an hour's rerun of some of Charles River's own locally-produced programs from the preceding week, network reruns or first-run network programs not carried by other stations, or programs produced by other stations.

458. Boston Broadcasters, Inc. (BBI) was formed as a result of a discussion in Boston in late September 1962, between Herbert Hoffman and Judge Matthew Brown. Mr. Hoffman is the sole owner of the stock of Champion Broadcasting System, Inc., licensee of stations WBOS–AM and FM, Boston. He also owns one-third of the stock of York Broadcasting, Inc., licensee of station WSME, Sanford, Maine; and is a 12-percent stockholder in Downeast Television, Inc., applicant for a television station in Bangor, Maine (this application has been granted). Judge Brown, a practicing attorney and a friend of Herbert Hoffman's, has represented station WBOS. On September 26, 1962, the Commission issued its decision awarding a 4-months license to WHDH, Inc. A day or two later, Herbert Hoffman handed Judge Brown a copy of a reprint in the Boston Globe of the Commission's memorandum opinion and order, the dissenting opinion of Chairman Minow, and the concurring opinions of Commissioners

Cross and Ford. He asked for Judge Brown's views on this material, with the idea of a possible business association.

459. Judge Brown read the reprint and the accompanying newspaper account and concluded that the opinion of the Commission was tantamount to an invitation to file competing applications for channel 5. He referred the matter for further study to Nathan H. David, who the previous spring had joined Judge Brown's firm, Brown, Rudnick, Freed, and Gesmer. Mr. David had been employed by the Commission from 1939 to 1943, with an interruption of 6 months, and between 1946 and 1959 had practiced before the Commission.

460. Following study of the matter, Mr. David concurred in Judge Brown's conclusion that the Commission was calling for additional applicants. From these beginnings the group that became BBI was formed. Alford Rudnick, Judge Brown's partner, early became interested in the project and participated with Judge Brown and Herbert Hoffman in discussions looking to forming an applicant composed of local people.

461. On November 8, 1962, a luncheon meeting was held. Persons were invited who were thought by Herbert Hoffman, Judge Brown, and Mr. Rudnick to be suitable for consideration as possible members of an applicant. Herbert Hoffman acted as host. Among those at the meeting, in addition to Judge Brown, Herbert Hoffman, and Mr. Rudnick, were Nathan David, Louis Smith, Alfred Morse, Dr. Jordan Baruch, and Washington communications counsel. The luncheon ended with the understanding that those present would continue to explore the problem and to contact other interested, suitable local people. It would then be decided whether the group should apply.

462. About a month later Dr. Leo L. Beranek committed himself to the project after becoming interested through his associate, Dr. Jordan Baruch. William J. Poorvu and Charles Maliotis also joined the group in December. Beginning in late December there was a series of meetings, where nearly every day or every other day several of the members would meet to compare notes on what had been done. Other persons were approached with invitations to become members; Mr. Poorvu, for example, was the first member to talk with F. William Andres, F. Stanton Deland, Robert G. Gardner, Mr. Maliotis, Edward C. Bursk, Mrs. Eunice West, and Richard S. Burdick. Mr. Poorvu told prospects whom he saw that the primary reason for joining should not be the profitability of the investment; he said that the value of the channel would depend upon many factors, and that therefore no generalization was possible. The group wanted local people who were active in the community and aware of various aspects of its problems; who would be able to spend time in preparatory work for the application; and who would be involved in the operation of the station. Further, it was felt that there should be a diversity of experience and backgrounds among the members, and, if possible, the membership should include people "who had had some association with the communications field" (tr. 10237).

463. In January it was decided to form a corporation. This was done on January 21, 1963. The series of group discussions which had begun in October and had continued in the following months was

continued in January. There was consideration of the project's objective and the principles which would govern the operation of the station if the application were successful. Programing was a main topic.

464. In the meantime, recruitment of additional stockholders continued. As it was expressed at this time, the object was to obtain a diversified group of 20 to 30 roughly equal stockholders who were natives or long-time residents of Boston, interested in communications and active participants in community affairs; all would have time to work on planning the project, and some of them would be able to participate in the actual operation of the station. In January Nathan David, who, before then, had served the group as a lawyer with experience in administrative law, became a stockholder.

465. Early in January 1963, it was decided to monitor all the Boston television stations and to make a survey of newspaper treatment of television in the area. About the same time it was arranged to have a demographic study made. There were also plans for a series of interviews with community leaders, and in January actual interviews began.

466. In December 1962, the group engaged Alfred Feldman to assist it. Mr. Feldman was a native of Boston who had lived there until the age of 23. While a student at Harvard College he had worked for the Harvard network and later for a commercial radio station in Boston. He then went to New York, where he was employed for 9 years by CBS–TV, followed by 9 months with NBC, then by about 4 years with a New York advertising agency. Mr. Feldman became interested in the proposed BBI group about the middle of December 1962, learning of it in New York. He wrote to Judge Brown and was asked to come to Boston to talk with members of the group, and did so. After an exchange of ideas, Mr. Feldman, around Christmas, was retained as a program consultant. He acted as program consultant until about March 15, 1963. It was thought that he might also be a stockholder. His work consisted of the development of programs from ideas proposed by the group, development of research projects involved in the application, and talking with nonstockholders in the community to "find out what ideas they might offer based on their connections with various community organizations" (tr. 9416). Mr. Feldman's reports and the program ideas developed in discussions among BBI stockholders were used in drafting the first proposed program schedule. (Mr. Feldman had not previously been a consultant to a group filing a television application, but he had considerable experience in television production.)

467. Lawrence Pickard made this draft. Mr. Pickard had been introduced to the group by Mr. Feldman. Mr. Pickard and Mr. Feldman had been friends and broadcasting associates. Mr. Feldman had asked Mr. Pickard in early February 1963 for advice on setting up the BBI proposed news operations. At the time Mr. Pickard was with WBZ–TV, Boston, as director of news and special projects. He became interested in the idea of a group such as BBI; and when Mr. Feldman found it necessary to end his connection with the group for reasons of health, he recommended Mr. Pickard to Judge Brown, who inter-

viewed him. Mr. Pickard later met with Dr. Baruch, Mr. Poorvu, Mr. Feldman, and Mr. David, agreeing to serve as a consultant to the group on news and public affairs. His first formal meeting with BBI was on February 7, 1963, when he was a guest. In January Mr. Pickard told WBZ–TV that he was planning to leave it; in February, he formally resigned, effective February 22. Mr. Pickard helped to take Mr. Feldman's place with BBI. Some time between February 7 and February 16, an understanding was reached that he would be a full-time employee if the group received a construction permit. Before the meetings with Mr. Pickard, it had been proposed that key personnel be stockholders so that "good people" could be attracted (tr. 9891). An agreement for Mr. Pickard's stock participation was reached in connection with his proposed staff position.

468. Also in February 1963, Richard S. Burdick was approached to join the group as general manager. In mid-March he agreed to do so. Mr. Pickard worked out of the BBI office, generally under the direction of Mr. Burdick, Mr. Poorvu, and Mr. David, although the work usually was by joint agreement.

469. In February 1963, Mr. Gardner, Dr. John H. Knowles, and Mrs. West agreed to invest and participate in the project. Mr. Gardner had been approached by Mr. Feldman in January 1962, because of his reputation as an authority on art films. During the discussion, Mr. Gardner became interested in knowing more about the BBI group. A week or 10 days later Mr. Gardner and Mr. Poorvu met to discuss plans for the kind of operation the group was trying to put together. Mr. Gardner soon suggested two other persons who eventually became members of the group, Dr. Knowles and Constantin A. Pertzoff; and afterwards a third person, Dr. Gerald Holton. On February 7 Mr. Gardner attended a formal meeting of the group and decided to become a member. At the suggestion of Mr. Poorvu, who knew Mrs. West and of her broadcast background and interest in television, she was interviewed by Mr. Poorvu, Dr. Baruch, Joshua A. Guberman, and Mr. David about her ideas on television and her background. She was invited to become a stockholder and accepted in February 1963. In March Mr. Andres, Mr. Deland, E. Lester Goodrich, Dr. Oscar Handlin, Mr. Pertzoff, and Edwin H. B. Pratt joined the group; and Herbert Hoffman, who had been a participant up to that time, decided to drop out because he felt he had to choose between joining BBI and the application in which he had an interest in Bangor, Maine. He found that he did not have the time for BBI's planning and frequency of meetings. On March 23, 1963, his brother, Martin Hoffman, joined BBI. Martin Hoffman had first learned of the formation of the BBI group in October 1962; and although he had a longtime interest in broadcasting, he first asked to be considered for membership when his brother withdrew.

470. Meetings of the group as augmented from time to time by additional members continued through February and into late March. Dr. Baruch and Dr. Beranek took the lead in working on administrative problems; and Mr. Gardner and Dr. Handlin in programing. In February preliminary information was available from the various surveys, as were, before March 26, 1963, a draft of the demographic

study and a report from a program advisory committee which had been set up.

471. In February, following his initial meeting with the group, Mr. Burdick took back with him drafts which the group had prepared on programing and notes on proposed programs and plans. During the remainder of the month, and into March, he had many telephone discussions with Mr. Poorvu. On March 19 he met in New York with Mr. Poorvu and Mr. Guberman to discuss proposed programs, the plans for participation of stockholders, the nature of the proposed community service, and a contract for his employment. After March 19 he worked on the refinement of program ideas. On March 22, 23, and 24 he was in Boston for meetings with the stockholder group as a whole and with individual members, and to work on preparing an application. These meetings included discussions with Dr. Beranek, Mr. Pickard, and a production consultant from a Providence commercial television station on the adequacy of proposed personnel, equipment and facilities to effectuate the proposed typical week; and consultations with these and other individual BBI members and with the stockholders as a body on program plans and modifications. There was agreement on the proposed typical week which was adopted for inclusion in the BBI application. On March 26, 1963, Boston Broadcasters, Inc., filed its application for a construction permit for Channel 5 in Boston.

472. After filing of the application, Mr. Burdick maintained contact with the group through correspondence and telephone, particularly with Mr. Pickard; and also went over live program proposals with the production manager of WHYY-TV, Wilmington, of which Mr. Burdick was general manager. The group continued its study of the community and the recruiting of additional stockholders. Near the end of March or early April, Edward C. Bursk agreed to become a stockholder. Others who became stockholders in April were John B. Atkinson; Gerald J. Holton; and Julian D. Steele. Beginning in April, Mr. David began regularly to devote the equivalent of a normal work week to the affairs of BBI. Mr. Pickard continued to do paid work for BBI through August 1963. The group continued its work through April into May.

473. One of Mr. Burdick's chief functions in the preparation of the initial application had been in programing. This continued to apply to the subsequent amendments. Through conversations with Mr. Pickard and other members of the group, in Boston, New York, and Philadelphia, he participated in the exchange of ideas that resulted in modifications to the schedule and the addition of new programs. He received, by mail and by telephone, reports of community interviews and surveys; and on trips to Boston, he talked to Dr. Handlin. While in Boston, he also discussed with Dr. Handlin the meetings of the Program Advisory Committee, and attended a meeting of the committee at the Harvard Club. The survey and interview reports, questionnaires and reports on meetings of the Program Advisory Committee were used in the writing of the descriptions of BBI proposed programs in exhibit 3–C. On May 21, 1963, a major amendment to the application

was filed, embodying changes in program proposals and adding stockholders. Minor amendments were filed on May 29 and July 24, 1963.

474. Further development of the BBI plans continued into the summer of 1963. Stockholders Henry Jaffe, Alan Neuman, and Barry Wood were added and changes made in the programing. Mr. Burdick met with Mr. Jaffe, Mr. Wood, and Mr. Neuman in New York City on August 7 to discuss their reactions to program plans and their programing ideas, and to review with them the physical plant proposal and drafts of plans for equipment and personnel. On August 13 Mr. Jaffe, Mr. Neuman and Mr. Wood went to Boston for an 8- to 10-hour meeting with many of the group. Between August 13 and September 3 Mr. Jaffe, Mr. Wood, Mr. Neuman, and a member of their staff spent full time on suggesting programing for the proposed station. Mr. Neuman went to Philadelphia on August 23 for a further conference with Mr. Burdick and Mr. Burdick, Mr. Neuman and Mr. David met in New York on August 26, 27 and 31. During this period Mr. Burdick also had two telephone conversations with Mr. Wood regarding program plans. Mr. Burdick studied materials in the files assembled after contacts with film distributors, and talked with people who purchase films and with film distributors. With other members of the group he prepared a budget of production costs of each local program; the primary film budgets; and the proposed organizational chart following discussions of personnel relationships at board meetings. He also worked with Mr. Poorvu in arriving at the anticipated weekly average of spot announcements. A fourth amendment was then filed September 3, 1963. Another amendment, dated September 12, 1963, making minor changes in financing, was filed before designation for hearing.

475. BBI continued to make community contacts. After the hearing began, leave was granted to file two additional amendments, on November 6, 1964 and June 16, 1965, to take account of additional financing made necessary by the length of the hearings. Since these last amendments made changes in the percentages of stock held by various stockholders, leave to amend was granted subject to the condition that in considering BBI's case only the percentages least favorable to BBI from a comparative standpoint would be taken into account.

476. By June 1964, BBI had held 25 formal stockholders' and directors' meetings. Most of the stockholders' meetings ran over 4 hours; several lasted all day; and none was for less than 2 hours. From November 8, 1962 until June 1964, informal meetings of three of four members of the BBI group have run well over 50; meetings of fewer than three totaled in the hundreds in that period.

477. *Stockholders.* BBI is a Massachusetts corporation authorized to issue 150,000 shares of $1 par value common stock. As of June 11, 1965, 25,278.5 shares had been issued and subscriptions for 4,679.5 additional shares had been received. In addition, if BBI is successful, stock will be issued to Richard S. Burdick and Lawrence Pickard in the amounts of 1,930 shares and 772 shares, respectively. Stockholders of Boston Broadcasters, Inc., with their percentages of ownership are:

	Before designation for hearing	6th amendment	7th amendment
Andres, F. William	2.23	2.70	2.30
Atkinson, John B. (deceased)	1.34	1.08	.92
Baruch, Jordan J	4.45	5.41	5.42
Beranek, Leo L	4.45	5.41	5.42
Brown, Matthew	5.12	6.24	6.57
Burdick, Richard S. (to be issued only on grant)	5.93	5.91	5.91
Bursk, Edward C	1.11	1.44	1.53
David, Nathan H	6.67	6.31	6.57
Deland, F. Stanton, Jr	2.23	2.70	3.06
Gardner, Robert G	3.34	3.61	4.59
Goodrich, E. Lester	5.56	4.51	4.59
Handlin, Oscar	2.23	2.39	2.34
Hoffman, Martin	4.45	3.61	3.06
Holton, Gerald J	.45	.45	.39
Jaffe, Henry	2.14	3.25	2.75
Knowles, John H	3.34	2.70	2.30
Maliotis, Charles	6.67	2.16	1.84
Marran, C. Charles	5.56	5.41	5.51
Morse, Alfred L	3.34	3.40	3.39
Morse, Lester S	3.34	3.40	3.39
Neuman, Alan	.71	1.80	3.06
Pertzoff, Constantin A	4.45	3.60	3.06
Pickard, Lawrence (to be issued only on grant)	2.37	2.40	2.36
Poorvu, William J	6.67	6.31	6.57
Pratt, Edwin H. B	2.23	2.70	2.30
Rudnick, Alford P	5.12	6.24	6.57
Smith, Louis P	.45	.36	.31
Steele, Julian D	1.11	.90	.86
West, Eunice, Mrs	2.23	1.80	1.53
Wood, Barry	.71	1.80	1.53

478. F. William Andres was born in Egypt in 1906 and has lived in the Boston area since infancy. His home is in Chestnut Hill. His parents were U.S. citizens temporarily abroad. He graduated from Dartmouth College in 1929 and Harvard Law School in 1932. Since 1932 he has practiced law in Boston as either an associate or partner in the Boston law firm of Sherburne, Powers & Needham. In connection with his law practice he has been an officer or director of a number of corporations, one of which is Concert Network, Inc., a holding company for FM stations WBCN, WHCN, WXCN, and WNCN.

479. From 1947 to 1953 he was an elected member of the Brookline Town Meeting and has been a member of the Brookline Personnel Board since 1957. From 1948 to 1957 he was a member of the board of directors of the Brookline Citizens Committee, Inc. Since 1947 he has been a trustee of Beaver Country Day School, Chestnut Hill, and since 1953 president of the corporation. He is also general counsel for the New England Association of Colleges and Secondary Schools. From 1956 to 1963 he was a trustee of Bennington College and he has been president of the General Alumni Association of the Phillips Exeter Academy and a member of its board of trustees since 1962. In 1963 he was made a trustee of Dartmouth College. From 1958 to 1961 he was regional chairman of the Dartmouth capital gifts program for Massachusetts and Rhode Island. Since 1954 he has been a trustee of Elizabeth Carleton House, Boston, and since 1957 president of the corporation; the House is a nonprofit privately endowed home for the aged with about 100 residents. From 1957 to 1960 Mr. Andres was a member of the vestry of the Church of the Redeemer, Chestnut Hill. In 1960–61 he was chairman of the Greater Boston

Chapter of the Fund Drive of the Negro College Fund which raised $2,250,000.

480. John B. Atkinson, as above indicated, died during the course of the hearings. He was born in Cambridge in 1894 and lived in the Boston area all his life. He graduated from Boston College in 1916, and then studied for a year at Suffolk Law School, Boston. He received a degree of Master of Public Administration from Harvard in 1949. Harvard awarded him an honorary degree of master of arts in 1951. Since 1919 Mr. Atkinson had been in the shoe business. His stock was still in his name, pending probate.

481. Dr. Jordan J. Baruch was born in Brooklyn, N.Y., in 1923 and has lived in the Boston area since 1946. His home is in Chestnut Hill. He attended Brooklyn College for 2 years and, after an interruption for military service, entered and graduated from the Massachusetts Institute of Technology in 1947. He received a master's degree in electrical engineering in 1948 and a doctor of science degree in instrumentation in 1950 from MIT. In 1948 he was awarded fellowships in acoustics and he was elected to Sigma Xi, Tau Beta Pi and Eta Kappa Nu. He has been an assistant professor or lecturer at MIT since 1950. From 1948 to 1950 he was an instructor in electrical engineering at MIT, and also was a special instructor in servomechanisms for the U.S. Navy Underwater Sound Laboratories. From 1951 to 1955 he was assistant professor of electrical engineering, and from 1955 to the present has been a lecturer in electrical instrumentation at MIT. In 1949 he joined the consulting firm of Bolt, Beranek & Newman in Cambridge. In 1952 he became a partner in the firm. When it became a corporation he was its treasurer until 1961. He is a supervisory engineer, director and senior vice president of Bolt, Beranek & Newman, Inc., which is a publicly owned corporation.

482. Dr. Baruch was active in Boy Scout work in New York in 1941 and 1942 until his enlistment in the Army. Beginning in 1946 he was crafts instructor for 3 years at the Cambridge Community Center, organized a pack of Cub Scouts, and was a Cub master or Cub supervisor. In 1956 Dr. Baruch received the Eta Kappa Nu Award for "Outstanding Young Electrical Engineer." He is a fellow of the Acoustical Society of America; the New York Academy of Science; and the American Academy of Arts and Sciences. He is a member of several professional associations. He has made contributions to medical record-keeping in hospitals, to medical instrumentation, and to acoustical invention, and has published many papers on his researches.

483. Dr. Baruch enlisted in the U.S. Army Signal Corps in 1942, at the age of 19. He served in England, France, Germany, and the Low Countries, and in the Philippine Islands and Japan. He was separated from the Army in 1946 as a staff sergeant.

484. Dr. Leo L. Beranek was born in Iowa in 1914 and has lived in the Boston area since 1936. His home is in Winchester, Mass. He graduated from Cornell College (Iowa) in 1936, with distinction, and received an M.S. degree in 1937 and a Sc.D. degree in 1940, both from Harvard. He is a member of the Phi Beta Kappa, Eta Kappa Nu and Sigma Xi. Dr. Beranek was a research assistant at Harvard Univer-

sity from 1937 to 1939; an instructor in physics at Harvard in 1940 and 1941; an assistant professor of communication engineering and director of the electro-acoustics and systems research laboratories at Harvard from 1941 to 1946; and an associate professor and technical director of the Acoustics Laboratory at MIT from 1947 to 1958. From 1948 to 1953 he was a partner in Bolt, Beranek & Newman of Cambridge, Mass., and has been president of that publicly-owned firm from 1953 to the present. Bolt, Beranek & Newman is a research, consulting, and development organization in the fields of applied physics and engineering, architectural acoustics, chemistry, psychoacoustics, engineering psychology, man-machine systems, information systems, and bio-medical technology. Dr. Beranek is also a lecturer at the Massachusetts Institute of Technology.

485. Dr. Beranek was chairman of the panel on acoustics of the research and development board of the Department of Defense from 1949 to 1952. From 1955 to 1958 he was a member of the national research council of the Armed Forces joint committee on hearing and bio-acoustics in Washington. In 1958 he became a member of the national advisory committee for aeronautics subcommittee on aircraft noise. He has published over 70 technical papers, and five books on acoustics and sound control. He is a member of and an officer in many professional societies and has been elected a fellow in the American Academy of Arts and Sciences. He has been a trustee of Cornell College (Iowa) since 1956. He has received a number of honorary degrees, awards and decorations, including a D.Sc. from Cornell College, and a Presidential Citation of Merit for contributions to the war effort. Dr. Beranek has contributed widely to all aspects of acoustics, including electro-acoustics, psycho-acoustics, and systems research. He has lectured on acoustics for universities and professional societies in other countries. Either alone or with his associates, he has been acoustical consultant for a substantial number of concert halls and opera houses at home and abroad. He has also been acoustical consultant in the designing of television studios for ABC–TV in New York, CBS in Chicago, Philippine Broadcasting Co. in Manila, and Danish State Radio, Copenhagen. He is interested in music and in 1962 was president of Opera Group, Inc., of Boston. Dr. Beranek claimed no knowledge of the details of local government, nor any significant participation in the civic affairs of Winchester, where he has lived for 15 years. His community activities in the Boston area have been confined to music.

486. From 1940 to 1943 Dr. Beranek was secretary of the National Research Council, committee on sound control in combat vehicles. From 1943 to 1945 he was a special advisor to the Chief of Naval Operations, with special assignment for 1 month aboard the U.S.S. *Canberra.*

487. Matthew Brown was born in New York City in 1905 and has lived in Brookline since 1925. He graduated from New York University in 1925 and from Harvard Law School in 1928. He has practiced law in Boston since 1928 and has been a partner in the firm of Brown, Rudnick, Freed & Gesmer since its formation in July 1960 and before that in its predecessor firms. In 1962 he was appointed for life as a

special justice of the Boston Municipal Court. The appointment does not demand all of Judge Brown's time. In the busy season he usually spends about 1 day a week on his judicial duties.

488. Judge Brown has been a Brookline Town Meeting member since 1948, and from 1955 to 1964 was a selectman of the town of Brookline. In 1962 and 1963 he was elected chairman of the board of selectmen. In 1964 he declined to run for reelection. In 1952 and 1953 he was a member of the board of directors of the Brookline Citizens Committee, Inc., and from 1950 to 1953 was a member of the board of directors of the Brookline Forum. In 1962 he was appointed by the Governor to serve on a special commission on school transportation. He is a member of several bar associations and in March 1964, was elected to the council of the Boston Bar Association. He is a former chairman of the Committee on Meetings of the Boston Bar Association and a former member of the National Panel of Arbitrators of the American Arbitration Association.

489. In 1953 Judge Brown was general chairman of the Combined Jewish Appeal for Boston, which raised about $5 million under his direction. In 1954 and 1955 he was president of the Jewish Community Council of Metropolitan Boston; the JCC coordinates the community and public relations activities of 28 Jewish organizations in the area. In 1949 and 1950 he was chairman of the Boston Chapter of the American Jewish Committee and has been a member of the national executive committee since 1951. He has been a director of the Beth Israel Hospital since 1961. In 1961 he was made an honorary life trustee of the Combined Jewish Philanthropies. Since 1958 he has been a member of the urban league, and since 1961 he has been a member of the World Affairs Council. For 10 years he has been a director of the Brandeis University Associates, a group pledged to support the university financially and in any other manner open to it. Since 1946 he has been a member of the board of trustees of Temple Adath Israel, of which he was vice president from 1961 to 1963; president of the Temple Brotherhood during 1946, 1947 and 1948; and now an honorary life trustee.

490. Judge Brown is author of a manual on conditional sales contracts, chattel mortgages and trust receipts, as well as of articles on other legal subjects. In 1963 he was a lecturer at seminars of the New England Law Institute. As a practicing attorney Judge Brown has been a clerk or officer of several business corporations.

491. Richard S. Burdick was born in Pittsfield, Mass., in 1916 and lived in Massachusetts until 1939. From 1954 to 1963 he was a periodic visitor to the Boston area. He planned to have his family join him in a Boston home by September 1964. At the time of the hearing he still lived in Pennsylvania. Mr. Burdick attended the Evans School of Radio, New York City, in 1940 and 1941, and classes at the University of North Carolina in 1954 and 1955.

492. From February 1956 to December 1963, Mr. Burdick was in complete charge of the administration and operation of the noncommercial television and radio stations licensed to WHYY, Inc., Philadelphia; he was responsible to the president and the board of directors. The stations included WHYY–TV (channel 12), Wilming-

ton, Del., with separate, coordinated studios and staffs in both Wilmington and Philadelphia; WUHY–TV (channel 35) and WUHY–FM, Philadelphia. As executive vice president and general manager, Mr. Burdick directed the activities of both television facilities, including acquisition of studios, hiring of staff, development of programs and production, departmental integration, and the establishment of WHYY–TV as a major producer of programs and program series on videotape and film for National Educational Television (NET). In addition to executive and administrative responsibilities at WHYY, Mr. Burdick also served as executive producer and in other creative capacities for several series of programs under contract to NET. One of these series, "Independence Adventure," which he wrote, won the Freedom Foundation George Washington Honor Medal in 1962. The program "All About Animals" won an Ohio State Award in 1960. The series "Lyrics and Legends," filmed in various parts of the United States and Mexico, of which Mr. Burdick was executive producer, is currently in distribution to stations throughout the country. In 1962 Mr. Burdick, in association with James Magee, developed a proposal for the study and implementation of the Pennsylvania Educational Television Network, which was accepted and supported by a grant from the Ford Foundation. In 1959, following a proposal created and submitted by Mr. Burdick, the National Association of Educational Broadcasters (NAEB) and NET made a grant-in-aid to WHYY to assist in the research, writing and production of 26 programs on American literature, entitled "Listen to The Land." Mr. Burdick wrote, produced and narrated these programs in their entirety; they are still in distribution throughout the United States.

493. While Mr. Burdick was in charge of the WHYY stations he was, from 1960 to 1964, a member of the Pennsylvania Advisory Committee on Educational Television; chairman, 1963, of the Affiliates Committee of National Educational Television, a group chosen by affiliated ETV station managers to represent them in network affairs; director of region I and a member of the board of directors of the National Association of Educational Broadcasters, 1959 to 1962; and chairman of the television committee of the NAEB, 1962 to 1963.

494. From 1954 to 1956, just before moving to Philadelphia, Mr. Burdick was executive producer and director of operations of WUNC–TV (channel 4), the educational television station of the University of North Carolina. He was also in charge of the motion picture production unit, housed at the University, which produced feature films and short subjects for television. Mr. Burdick joined WUNC–TV before it went on the air, and supervised the station's tri-campus studio development in programs, production, and operations. He also wrote, produced, and was featured performer in a weekly series of programs on channel 4, entitled "I Hear America Singing"; and wrote, produced, and directed several films under contract to the North Carolina Department of Highways. Mr. Burdick had gone to North Carolina in 1954 from Sacramento, Calif., where, in 1953, he had formed his own television packaging, production, and public relations agency. Among the accounts for which he produced television programs, or for whom he served as public relations counsel, were the Medical

Society of Sacramento, the Sacramento Heart Association, the California State Fair, and Del Paso Country Club. Mr. Burdick also created "The Max Baer Show" for the McClatchy Broadcasting Co., and was producer of the program for 2 years.

495. McClatchy Broadcasting Co. was Mr. Burdick's employer for 5 years, from 1948 to 1953. During this time he was, except for the final few months, program director of station KFBK, Sacramento, Calif. For the final year of his employment he was producer-writer of experimental television programs and films for the McClatchy program division. Concurrently with his position with the McClatchy Broadcasting Co. and afterward, Mr. Burdick was a stage director with the Sacramento Civic Repertory Theatre, for which he directed several dozen plays. In 1953 he wrote the sketches, music and lyrics, and directed the revue "Razzle-Dazzle!," which was optioned for production in Hollywood. Several of the songs from this show are published and recorded. In 1952 and 1953 Mr. Burdick was also on the faculties of Sacramento State College as an instructor in writing and directing, and of the Eaglet School of the Theatre, Sacramento, as an instructor in acting. Mr. Burdick had gone to Sacramento from Hollywood, where he had been engaged in writing scripts for network broadcasts and motion pictures and special material for songs for entertainers. Among the programs for which he wrote dramatic scripts or special material were the "Columbia Workshop," "Family Theatre," "Theatre of Classics," "Hopalong Cassidy," "Dr. Kildare," "The Victor Borge Show," and "The Great Gildersleeve." As a screenwriter he was employed by Sol Lesser Productions and Picture Plays, Ltd. Before going to Hollywood Mr. Burdick had been production manager of station KSFO, San Francisco, 1945–1947. This employment had immediately followed his military service.

496. Mr. Burdick has not "worked in commercial television * * * on the station level" (tr. 6959). He had not produced more than 7 to 10 hours of programs in any of the years in which he had been with a television station. He testified that BBI's limitation on the maximum commercial time in a 5-minute program would be "in accordance with the NAB code. I have forgotten exactly what that is" (tr. 7225—vol. 59).

497. Mr. Burdick is a member of the National Association of Educational Broadcasters; the Television Radio and Advertisers Club of Philadelphia (since 1962); the Philadelphia Zoological Society (since 1958); and a founder-member of the committee for International Music Exchange (since 1962). He has assisted the World Affairs Council of San Francisco and Philadelphia in the preparation of radio and television broadcasts and public relations activities; the Junior League of Sacramento in special programs for children; and the Boy Scouts of America, Pittsfield, Mass., in drilling practice and merit badge preparation; and he has participated in functions of the Society of Friends, Newtown, Pa., since 1956.

498. Mr. Burdick is a veteran of World War II, having served from 1941 to 1945. He was one of the writers selected by Irving Berlin for the all-soldier musical, "This is the Army," in which he acted and sang in the road version and the motion picture version by Warner Brothers

Studios. Before this he collaborated in one of the first all-military musicals of World War II, "Swing Fever!" Mr. Burdick collaborated on the book, wrote all the music and lyrics, and directed the production. In 1944, following completion of the motion picture version of "This is the Army," Mr. Burdick was assigned to the public information office of the Air Service Command, McClellan Air Force Base, Calif., where he produced, directed and wrote more than 1,000 radio broadcasts. Later he was assigned to the Santa Ana Air Force Base, Calif., as a writer-producer of broadcasts, and was sent on a national tour of Air Force bases to gather material preparatory to writing a CBS network series on the rehabilitation of servicemen. In addition to the above assignments, Mr. Burdick wrote three full-length stage productions, directed by Ezra Stone, on special assignment to the Air Service Command, the Army Camouflage Division, and the Fourth Air Force. The last-named assignment included the writing of the Fourth Air Force March.

499. Edward C. Bursk was born in Lancaster, Pa., in 1907 and has worked in Cambridge and lived in the Boston area since 1942. His home is in Cohasset, Mass. He graduated from Amherst College in 1928 and was elected to Phi Beta Kappa. The following year he received an A.M. degree from Harvard University, where he did graduate study until 1931.

500. Professor Bursk taught at Dartmouth College from 1931 to 1933, and at Franklin and Marshall College in 1941 and 1942. He joined the faculty of the Harvard Business School in 1942. Appointed professor of business administration in 1953, he has taught in advanced management, middle management, and MBA programs. From 1933 to 1941 he was president of the H. H. Bursk Co., a firm of wholesale distributors. In 1943 Professor Bursk was named managing editor of the Harvard Business Review, which is published in Boston. He has been editor of the review since 1947.

501. Professor Bursk has been chairman of the board of trustees of the Browne and Nichols School since 1960; vice president of the Massachusetts Federation of Taxpayers Association since 1963; director of the Boston World Trade Center since 1962; and a member of the board of the Massachusetts Mental Health Association and of the National Export Expansion Council since 1962. He is the author and editor of textbooks, and author of many articles on marketing. He has been vice president, Marketing Management Division, of the American Marketing Association since 1962; educational director of the International Marketing Institute since 1960; and chairman of the Boston Conference on Distribution since 1961. For 2 years, beginning in 1962, he moderated "Marketing on the Move," a weekly TV and radio program featuring leading national businessmen, originating on channel 2, Boston, carried by channel 4, New York, and offered by NET to educational channels elsewhere.

502. Nathan H. David was born in Somerville, Mass., in 1913 and lived in the Boston area until 1929, when he moved to Washington, D.C. He returned to the Boston area in June 1962, and has lived there since then. He graduated from Yale in 1934 with high honors, and was

elected to Phi Beta Kappa. He graduated from Harvard Law School in 1937 magna cum laude. He was an editor of the Harvard Law Review and case editor for 1 year.

503. Mr. David is an attorney associated with Brown, Rudnick, Freed & Gesmer in Boston. He entered the private practice of law in Boston in 1937 and was formally admitted to the Bar of Massachusetts that year. In October 1939, he went with the Federal Communications Commission as administrative assistant to the Chairman, and in 1941 he joined the Law Department of the FCC. The same year he became communications counsel to Col. (later General) William J. Donovan, head of the office of the Coordinator of Information (later Office of Strategic Services). In January 1942, Mr. David returned to the FCC Law Department as chief of one of its divisions; and in October 1942, was appointed assistant general counsel. He has followed with interest the development of television for 25 years in Boston and elsewhere. After serving with the Navy from November 1943 to July 1946, he engaged in private practice from 1946 to 1959 in the District of Columbia. From 1959 to 1962 he was president, treasurer, and a substantial stockholder of Lajas Valley Agricultural Corp., which set up and operated an experimental project growing vegetables during the winter for shipment from Puerto Rico to mainland markets. The project encountered serious problems of supervisory farming personnel and maintenance of proper refrigeration of cargoes. In April 1962, the company's directors filed a voluntary petition in bankruptcy. Mr. David was the largest investor in the enterprise and its largest private creditor. With the termination of the project, Mr. David in April visited Boston, where a friend suggested a possible association with the firm of Brown, Rudnick, Freed & Gesmer. It was agreed that he would report for work after Labor Day, 1962.

504. While living in Washington, Mr. David was chairman of the troop committee of a large Boy Scout troop, and a member of the District of Columbia Bar Association, the American Jewish Congress, and the Harvard Law School Association. He helped to raise money for the Harvard Law School Fund. In Boston, he is a member of the Harvard Law School Association, the Bostonian Society, Beacon Hill Civic Association, Civil Liberties Union of Massachusetts, and the American Jewish Congress. He is a member of the AJC's Administrative Committee and Commission on Law and Social Action. In 1963, under the auspices of the Civil Liberties Union, he lectured to an adult education group in Cambridge. He is a member of the Boston and Massachusetts Bar Associations. In 1946 Mr. David was elected to the faculty of the Yale Law School, but declined appointment. In June 1955, while in private law practice, he was coauthor of a volume entitled Government Security and Loyalty, a manual of laws, regulations and procedures, published by the Bureau of National Affairs, Inc., Washington, D.C. From that date until 1960 he was editor of monthly supplements and newsletters published by the same organization in connection with the original publication.

505. In November 1943, Mr. David volunteered for induction and was assigned to the Navy, where he entered service as apprentice seaman. On October 3, 1944, he was commissioned lieutenant (j.g.) and

assigned to duty at the Office of General Counsel of the Navy Department, Washington. He was separated from the Naval Reserve as a lieutenant.

506. F. Stanton Deland was born in Boston in 1913 and has lived in the Boston area since his birth. His home is in Brookline. He graduated from Harvard College in 1936 and from the Harvard Law School in 1940. He has been associated with Sherburne, Powers & Needham since he was admitted to the bar in 1940, and a partner of that law firm since 1951. As an attorney he has been, since 1956 trustee, and since 1949 secretary, of General Investors Trust in Boston. Since 1958 he has been a director of Brookline Trust Co., and in 1954 was elected trustee of Brookline Savings Bank. From 1933 to 1937 Mr. Deland covered yachting news for Boston newspapers and for 2 years was yachting editor of the Boston Transcript. From 1936 to 1940 he was assistant athletic director at Harvard College.

507. Mr. Deland has been a trustee of the Boston Lying-in Hospital since 1954, and vice president of the hospital since 1961. Since 1957 he has been clerk and trustee of the New England Peabody Home for Crippled Children. From 1955 to 1958 he was a director of the Brookline Visiting Nurse Society, and from 1946 to 1960 he was a trustee of the Massachusetts Society for the Prevention of Cruelty to Children. He was a director of the Church Home Society from 1954 to 1957, and a director of the Army and Navy Service Committee, Inc. from 1955 to 1962. In July 1963, he was elected a trustee of Associated Hospitals Center, Inc. and has been active in the planning of the merger of six nonprofit teaching hospitals into one medical complex associated with the Harvard Medical School. He has been town meeting member of the town of Brookline since 1957, and a member of its planning board since 1962. From 1952 to 1956 he was on the town finance committee. From 1949 to 1952 he was a trustee of the Noble and Greenough School and since 1954 has been a trustee and clerk. In 1962 and 1963 he directed that school's fund raising; over $1,200,000 was raised. Since 1958 he has been a trustee of Browne & Nichols School, clerk and member of the executive committee of the Windsor School, and trustee of Wentworth Institute. He has been a member of the board of governors of the Harvard Club of Boston since 1962; from 1958 to 1963 he was a member of the Harvard Fund Council, and its chairman from 1961 to 1963. Since 1962 he has been a member of the Harvard University Overseers Committee on University Resources, and was a director of the Harvard Alumni Association from 1961 to 1963. He is a member of the Boston and American Bar Associations. In June 1941, as a Reserve officer, he was called into active service by the Navy as a Reserve ensign, and assigned to net tender and escort patrol vessels on convoy duty. He was later a member of the teaching staff at the Subchaser Training Center, Miami, Fla. He then attended the Naval War College and was assigned to the staff of ComPhibsPac. He was released to inactive duty as a Commander, USNR, in December 1945. He was awarded the Order of the Phoenix (Gold Cross) by the Government of Greece in 1943.

508. Robert G. Gardner was born in Brookline in 1925 and has lived in the Boston area all his life, except for about 5 years following gradu-

ation from college. His home is in Cambridge. He graduated with an A.B. from Harvard in 1948 and in 1955 received an M.A. from Harvard University after completing course requirements and passing oral examinations for a Ph. D. He elected at that time to accept full employment at Harvard rather than to submit a thesis for a Ph. D.

509. Mr. Gardner is now an anthropologist-film maker employed as a lecturer on visual studies, at associate professor status financially but without tenure, at Harvard University. From 1948 to 1949 he taught history of art at the College of Puget Sound, Tacoma, Wash. From 1949 to 1952 he directed a series of independent and sponsored films in the Seattle area. He was in the graduate school at Harvard from 1952 to 1955. He held a teaching fellowship in anthropology in 1954 and 1955. In 1955 he became director of a new department of the Peabody Museum at Harvard called the Film Study Center, a position which he continues to hold. From 1961 to 1962 he acted as leader and anthropologist-photographer on the Harvard Peabody Expedition in New Guinea. From 1962 until the present he has been coordinator of light and communication in the Carpenter Center for Visual Arts and lecturer on visual studies at Harvard (see above). Since 1959, he has been on the faculty committee on the Practice of Visual Arts at Harvard.

510. From 1953 to 1960, Mr. Gardner was either a member of the corporation or trustee of the Institute of Contemporary Art in Boston. He has been, since 1958, trustee of the Boston Arts Festival and currently is on the festival's executive committee. In 1964 he was elected a trustee of the Children's Museum, Jamaica Plain, Mass., and since then has served as a consultant to the museum. He is a member of the American Anthropological Association and vice president of the International Committee on Ethnographic Films. In 1964 he was elected to the American Academy of Arts and Sciences. Mr. Gardner has written and directed the following films:

"Mark Tobey"—Edinburgh and Venice Festival prize film on the American painter.

"The Hunters"—(codirector) Flaherty Award Winner.

"Dead Birds"—Recently completed full-length documentary of New Guinea warrior agriculturists. Received the Flaherty Film Award and the award for the best film in the Melbourne Film Festival, 1964; also received grand prize of one million lire and the Gold Lion at Florence Film Festival, January 1964. A television version of the film has been scheduled, under contract, for release in the British Isles, Switzerland, and Belgium, and is under option in the United States.

511. Mr. Gardner has contributed articles to "Daedalus", "Films in Review", "Current Anthropology", "Show Magazine", "Life", "Paris Match", and "Panorama". He has prepared a photo-ethnography for Viking Press which was to have been published in 1964. He has produced material for and has often appeared on television.

512. Mr. Gardner was drafted into the Navy in 1943, completed basic training, and was sent to Harvard University under the ROTC program.

513. E. Lester Goodrich was born in Hardwich, Vt., in 1900 and has lived in the Boston area since 1922. His home is in Lexington. He graduated from the University of Vermont in 1922. He is an insurance consultant and broker and a partner in the insurance firm of Goodrich,

MacLeod & Olson. In 1955 Mr. Goodrich originated the formula method for underwriting group life insurance now widely used in the United States. Group insurance had uniformly been based on the salaries of members of the group. Under the Goodrich formula cost is reduced and coverage for younger members of the group is broadened by taking age into account.

514. From time to time, at the suggestion of friends, Mr. Goodrich has made investments outside his regular business. One was in Therodyne Corp. He invested $10,000 in that company when it was organized because Professor Wulff of MIT, who was the father-in-law of the founder, was a good friend of his. When the company found itself in financial difficulties, Mr. Goodrich was asked to become a director, "to see if I could help them in saving the company, which was going on the rocks" (tr. 9657). Nevertheless, the company went into bankruptcy within a few weeks and he lost his entire investment. The record does not reflect the dates of any of these occurrences.

515. A second unfortunate investment with which Mr. Goodrich was connected was Dunn Engineering Co. At the request of Joseph Dunn, its founder and a friend of Mr. Goodrich's, Mr. Goodrich invested in that enterprise. The investment, made in 1960, totaled $3,915. In the early 1950's, at Mr. Dunn's request Mr. Goodrich had agreed to serve on the board of directors. While Mr. Goodrich was a director, the company made a public offering of its stock, which was traded over the counter. On March 29, 1962, at a meeting, the directors consented to an adjudication in bankruptcy. Mr. Goodrich could not recall attending that meeting, but he did know in late March 1962, that the company was about to go bankrupt because he had been told by Joseph Dunn. This was the first time he had heard about it. Mr. Goodrich was out of Boston and on the West Coast for some weeks in early 1962. When he left he understood the company was in good condition, having been told by Mr. Dunn that business was good, "very optimistic" (tr. 9743). When he returned from the West Coast, he learned that the company was about to go bankrupt. The assets were sold and Dunn Engineering went out of business. There was an SEC investigation of the Dunn Engineering matter.

516. A third company in which Mr. Goodrich invested was Twombly Associates, Inc., of Winchester, Mass. The firm manufactured school furniture and other items for schools. Mr. Goodrich's connection with this company began in 1954 when its new sales manager, a former school principal and superintendent, and a longtime friend, asked Mr. Goodrich to be an accommodation endorser on a note at a bank for $20,000 for working capital. Mr. Goodrich endorsed the note, which was paid off. Around 1955 or 1956 Mr. Goodrich was again approached, on this occasion to invest in the company. He bought $15,000 in debentures, acquiring with them some of the stock. In all, over a number of years, he invested more than $80,000 in debentures. In 1963 he lent Twombly $50,000 for working capital to produce furniture already under order, under an agreement that he would be repaid out of the proceeds as deliveries were made. By November 15, 1963, this loan had been reduced to about $16,000. In the meantime, in 1959, an affiliated company, Twombly Manufacturing Co., had been formed, in which Mr. Goodrich

bought stock for $25,000. In 1961 the manufacturing company became a wholly-owned subsidiary of Twombly Associates, and by an exchange of stock Mr. Goodrich received additional stock in Twombly Associates. In late 1963, in connection with an audit of the books required by the Small Business Administration, which had been asked for a loan, it was discovered by independent certified public accountants that the methods of the company's regular accountant were unorthodox and that the company was not in as good shape as had been believed, but was in fact bankrupt. On November 16, 1963, Twombly Associates petitioned the Federal Court under chapter XI of the Bankruptcy Act for an arrangement with creditors and a reorganization. At that point Mr. Goodrich had invested $125,000 in stock and debentures in addition to outstanding loans of about $34,000. He was the largest creditor and has so far recouped only 2½ percent of his claims out of the reorganization. As part of the reorganization he invested $20,000 more. The company has continued in business.

517. The BBI application and amendments did not mention Therodyne or Twombly. The application said that Mr. Goodrich had a 2-percent stock interest in Dunn "until 2 years ago," but the hearing exhibits do not refer to it.

518. Mr. Goodrich was a private in the Infantry in 1918. In 1922 he was a commissioned 2d lieutenant in the ROTC. He was an officer in the Massachusetts State Guard for the Duration of World War II.

519. Oscar Handlin was born in New York City in 1915 and has lived in Cambridge since 1939. He received his B.A. from Brooklyn College in 1934; and his M.A. in 1935 and a Ph. D. in 1940 from Harvard University. He holds an honorary LL.D. degree from Colby College (1962), and has held Guggenheim, Fulbright, and Social Science Research Council fellowships.

520. Professor Handlin is Winthrop professor of history at Harvard University. He began his teaching career as an instructor at Brooklyn College, where he taught intermittently from 1935 through 1938. In 1939 he began to teach at Harvard. He became an assistant professor in 1944, an associate professor in 1948, and a professor in 1954. He was appointed Winthrop professor in 1961.

521. Professor Handlin is a scholar and teacher who has devoted his attention to the social history of the United States and particularly of Boston. Men and women who have attended his seminars in the past 25 years are teaching in colleges throughout the United States. His first book, "Boston's Immigrants" (Dunning Prize, American Historical Association, 1941) examined a neglected part of America's past. A similar subject was treated on a wider scale in "The Uprooted" (Pulitzer Prize, 1951). For many years he taught a course at Harvard called the Boston Community. In an amused sidenote, BBI points out that Professor Handlin, though not an Irishman, was named by WHDH in its exhibit 5Q among "members of the Boston Irish Community" (proposed findings, p. 39). His most recent works are: "Race and Rationality in American Life"; "Readings in American History"; "Al Smith and His America" (Christopher Award); "Immigration as a Factor in American History"; "John Dewey's Challenge to American Education"; "American Principles and Issues";

"The Dimensions of Liberty" (with Mary Handlin); "The Americans"; and "Fire Bell in the Night". Professor Handlin also was one of the editors of the Harvard Guide to American History, and is the editor of the Library of American Biography. He has written many articles on educational and historical subjects for "The Atlantic Monthly," "The New York Times Magazine," and the now defunct "Colliers." Since 1958 he has been director of the center for the study of the history of liberty in America, at Harvard University.

522. Professor Handlin has appeared frequently on television. His most extensive participation in television was in the script-preparation and site-selection of a 1 hour-long CBS program, in which he also was the narrator. President Kennedy appointed him to the Board of Foreign Scholarships in 1962. He was reappointed to that body by President Johnson in 1964, and is now vice chairman. In 1955 he had been a special delegate to the North Atlantic Treaty Organization to help set up its cultural program. He has lectured to the NATO War College (Paris), the Army War College (Carlisle Barracks), and the Navy War College (Newport).

523. Professor Handlin is a member of the Colonial Society of Massachusetts, the Massachusetts Historical Society, the American Academy of Arts and Sciences, the American Historical Association, the Southern Historical Association, the Mississippi Valley Historical Association, the Economic History Association, the Council on Research in Economic History, the St. Botolph's Club, and the American Jewish Historical Society. He is also a trustee of the William Ellery Channing Memorial Foundation and a member of the American Jewish Committee. He was on the AJC's board of delegates and its National Advisory Council.

524. Martin B. Hoffman was born in Boston in 1936. He has lived in the Boston area all his life. His home is in Brookline. He attended the University of Florida for 2 years, beginning in 1954, and Boston University in 1956 and 1957. Mr. Hoffman is the vice president and credit manager of M. Hoffman & Co., Inc., Boston, and the treasurer of Blue Star, Inc., Mayaguez, P.R. Both companies are manufacturers of men's work clothing. He is a trustee of the Bardfield-Hoffman Realty Trust; and was on the membership committee of the New England Association of Credit Executives in 1959 and 1960. Mr. Hoffman has solicited funds for such organizations as United Fund, 1960; Easter Seals, 1962; Heart Fund, 1963; and Mayor's Charity Field Day, 1963. He was on active duty in the U.S. Army Reserve from February to August 1960, and from October 1961 to August 1962. Since then he has been in the Active Reserve.

525. Gerald J. Holton was born in Berlin, Germany in 1922. He has been a resident of the Boston area since 1943 and a U.S. citizen since 1945. He lives in Lexington. He received degrees from Oxford, England (1940); Wesleyan University (B.A. 1941; M.A. 1942); and Harvard University (M.A. 1946; Ph. D. 1948). He is now professor of physics at Harvard and chairman of the Committee on Degrees for Chemistry and Physics, and a member of the Committee for the History of Science and the Committee on General Education. Professor Holton is a member of and has participated in the work of many professional societies, including the American Physical Society

(chairman, New England section) and the Acoustical Society, is a fellow of the American Academy of Arts and Sciences, and a member of the Committee on the Public Responsibility of Scientists of the Academy.

526. Professor Holton is a member of the Institute on Religion in an Age of Science and was a founding member of its advisory board. He is a consultant to the Commission on the Impact of Science and Technology on Peace and War, formed by the National Council of the Churches of Christ. He was also a member of the subcommittee on Science of the Lexington School Committee, and is on the advisory boards of other schools, among them American Friends School in Cambridge.

527. He has written and edited a number of books, including "Science and the Modern Mind" (1958) and "Excellence and Leadership in a Democracy" (1962). In 1957 Professor Holton was founding editor of the quarterly scholarly journal "Daedalus" of the American Academy of Arts and Sciences, and was its editor until 1961. From 1957 to 1963, as editor-in-chief of the Academy, he has been general editor of "Daedalus." His work has been recognized by a number of awards and appointments, such as an outstanding achievement citation by Wesleyan University, 1961; Distinguished Service Citation of the American Association of Physics Teachers in 1962; appointment as George Sarton Memorial Lecturer in 1962; and appointment as a member of the Institute for Advanced Study, Princeton, N.J., in 1963–64. Professor Holton has lectured widely, has participated frequently in producing programs for radio, and has appeared on radio and television.

528. After completing his education at Wesleyan, Professor Holton joined Harvard in 1943 to do wartime research on an OSRD project and to teach in the radar course for officers of the Navy and in the ASTP course of the Army. He continued this work to the end of the war.

529. Henry Jaffe was born in New York City in 1907 and now lives in Los Angeles. He was educated at Columbia College (1927) and Columbia Law School (1929). At law school he was an editor of the "Columbia Law Review" and was its managing editor for 1 year.

530. Mr. Jaffe is the president and sole stockholder of Henry Jaffe Enterprises, Inc., producers of television programs, with offices in New York City and Los Angeles. He divides his time almost equally between the two cities. After graduation from law school, Mr. Jaffe for 6 years was associated with the law firm of Whitman, Ranson, Coulson & Goetz in New York City, which specialized in utilities litigation. He then established a law firm with his brother. In 1936 he and Lawrence Tibbett organized the first union for musical artists—the American Guild of Musical Artists. In 1937 he organized and became counsel for the American Federation of Radio Artists, now known as American Federation of Television and Radio Artists. He worked in these organizations for 20 years.

531. Because of illness of a client, the Jaffe law firm in 1952 took over the production of the 90-minute once-a-month spectacular "Producer's Showcase"; it produced this program for 5 years. Mr. Jaffe's corporation, Henry Jaffe Enterprises, Inc., founded in 1957, is en-

gaged in the creation, production, packaging, and sale of television programs. It maintains fully staffed production offices in Hollywood and New York. Subsidiary companies are active in the allied fields of music publishing and recording. Henry Jaffe Enterprises, Inc. has produced, packaged, and sold many shows and series, some of which have received the television industry's foremost awards. Mr. Jaffe also had produced soap operas in daily segments of 15-minutes and 30-minutes across the board on NBC. The most recent of these series was "Kitty Foyle," 30 minutes a day, some 3 or 4 years before the hearing.

532. A listing of some of the shows which Henry Jaffe Enterprises, Inc. has produced, packaged, and sold, and the awards they have received follows: "The Chevy Show," a 1-hour musical-variety series on NBC for 8 years; "Producer's Showcase," a 1½-hour dramatic anthology on NBC for 5 years, which won the Emmy Award for the best television dramatic series for 5 consecutive years beginning in 1952; "Peter Pan" which was on "Producer's Showcase" won an Emmy Award in 1955 as the best single program of the year; "Bell Telephone Hour," a 1-hour music-variety series of classical and quality modern music on NBC from 1959 to the present time, which won the Peabody Award in 1960, the Emmy Award for the best musical television show of the year in 1964, the Look TV Award as the best musical series of 1959, and top awards from the National Association for Better Television and Radio; "Shirley Temple Story Book," a 1-hour series of classic fantasies on NBC for 1 year and repeated on ABC for another year; "Alcoa-Goodyear series," a 1-hour dramatic anthology on NBC for many years; the "Dinah Shore Chevy Show," a 1-hour music-variety series on NBC for 6 years, which won the Peabody Award in 1959 and 1960, and the Emmy Award in 1957 as the best music variety show, and again in 1958 as the best musical or variety series; "Dinah Shore Show," a 1-hour music-variety series on NBC for 2 years, which won top awards from the National Association for Better Radio and Television; "Chevy Mystery Theatre," a summer anthology series of 16 one-hour mystery shows on NBC for two consecutive summer seasons; and "Highways of Melody," a 1-hour musical-variety series for Cities Service Co. on NBC. In addition, Henry Jaffe Enterprises, Inc., has produced and packaged many specials for major advertisers, including the Texaco Co., Chevrolet and Bell Telephone, for whom it supervised the first Telstar telecast.

533. Mr. Jaffe has been a guest lecturer on television production and writing at UCLA and at the Yale School of Drama. In 1956 he was chairman of the television and radio division of the United Jewish Appeal. He is a member of the American Jewish Committee, and since 1954 he has been a director of the Jewish Family Service. Since 1961 he has been a trustee of the American-Israel Cultural foundation. He is a member of the Lambs Club (since 1938), the Friars Club (since 1927), and the Jewish Theatrical Guild (since 1930).

534. Mr. Jaffe was in the U.S. Army from 1943 to 1945. He was trained first in field artillery. He later attended the Judge Advocate General's School and was in the Judge Advocate General's Office. He directed many USO camp shows during the war years.

535. John H. Knowles, M.D., was born in Chicago in 1926. He has lived in the Boston area since 1937. His home is in Chestnut Hill. He graduated from Harvard College (1947) and from the Washington University School of Medicine (1951, cum laude).

536. In 1961 Dr. Knowles was made director of medical affairs of Massachusetts General Hospital, Boston. In February 1962, when he was 35 years old, he was appointed general director, the youngest general director in the history of the 153-year-old hospital, which is the main teaching hospital of the Harvard Medical School. In 1959 he became chief of the pulmonary disease unit at the hospital, and instructor in medicine and then associate in medicine at the Harvard Medical School. Dr. Knowles now works a long day, 7 days a week, at the hospital, in writing at home, and on speaking engagements. He could get away for only one BBI stockholders' meeting, though he had many private discussions with BBI principals. He testified (tr. 7782): "It was all I could do to get down here today as a matter of cold, hard fact."

537. At present Dr. Knowles is a trustee of the Museum of Science and of Belmont Hill School; a director of the youth division of the Boston YMCA; a member of the National Affairs Committee of the Greater Boston Chamber of Commerce, of the Massachusetts Committee for Project Hope, and of the Men's Advisory Council of the League of Women Voters of Boston; and a director of the Harvard Alumni Association. He also teaches medicine and is a practicing physician in his subspecialty, chest diseases.

538. Dr. Knowles is the author of many articles in medical journals and of a textbook entitled "Respiratory Physiology and Its Clinical Application." He has recently completed editing a book of Lowell Lectures entitled "The Hospital's Responsibility to the Community," to be published by the Harvard University Press. The purpose of these lectures is to increase public understanding through better communication of the problems of hospitals and medicine today. The lectures were planned and organized by Dr. Knowles. He has also appeared on and been connected with the production of medical programs on television and radio. He was chosen one of the 10 outstanding young men of Massachusetts for 1961.

539. From 1953 to 1955 Dr. Knowles was a lieutenant, M.C., U.S. Navy, and was officer-in-charge, Cardiopulmonary Laboratory, U.S. Naval Hospital, Portsmouth, Va.

540. Charles Maliotis was born in Crete, Greece, in 1895 and has been a resident of the Boston area since 1913. He became a U.S. citizen in 1920. He lives in Belmont, Mass. Mr. Maliotis is the president of Lehigh Metal Products Corp., Cambridge, and president of the Freetown Screw Mfg. Co., Inc., a subsidiary of Lehigh Metal Products Corp. Both companies make nuts, bolts, and screws.

541. Mr. Maliotis was president of the Greek Orthodox Cathedral of New England in 1951, 1952, and 1959. Since 1961 he has been a member of the board of directors of the Greek Theological School and of the Mixed Council of the Greek Archdiocese of North and South America. Since 1945 he has been a member of the board of trustees of Athens College, and is a member since 1960 of the board

of trustees of Anatolia College, Salonica, Greece. Both colleges are "American Education Corporations." He has been a Shriner since 1945, and is a member of the following associations: The Cambridge Chamber of Commerce, The World Trade Center, Associated Industries of Massachusetts, Pancretan Association of America, Order of AHEPA, Executive Committee of the Heart Fund, Second Middlesex Business Climate Improvement Committee, and the committee to establish a Chair of Modern Greek Language at Harvard University.

542. Mr. Maliotis was in the U.S. Army in 1917 and 1918.

543. C. Charles Marran was born in Chicago in 1915. He has lived in the Boston area from 1938 to 1941, and again from 1944 to the present. His home is in Waban, Mass. He attended Armour Institute of Technology (now Illinois Institute of Technology) and Northwestern University, where he majored in Commerce. He is president and chief executive officer of Spencer Shoe Corp. and its subsidiaries, Boston. He has been in the retail shoe industry since 1936. In 1947 he was elected vice president and general manager of the Spencer retail operation, and occupied those posts until he was elected president in 1954. In 1956 he bought control of Spencer Shoe Corp. The company is listed on the American Stock Exchange. In 1954 Mr. Marran was elected a director of Great American Industries, Inc., a diversified holding company with interests in rubber products, cookies, and soft drinks. In 1962 he was elected a director of Curran Industries, Inc., Claremont, N.H., a new venture company in the scientific field.

544. In 1958 Mr. Marran was a captain of the Community Fund: in 1961 he was trustee of Young Presidents' Foundation, a nonprofit organization which emphasizes economic education, workshop for teachers, reviewing economic textbooks in high schools, and bringing together the teaching profession, management, and labor. He became a member of the organization in 1954 and later was chairman of its New England chapter. He is a life member of Brandeis University Clubs and a foster alumnus of Brandeis University. He is an associate life member of the Actors Fund of America. He has served as vestryman, Church of the Good Shepherd in Waban.

545. He has been a visiting lecturer at Harvard Business School, Cornell University, Boston University, Boston College, and Amos Tuck School of Business of Dartmouth University, in association with the education program of Young Presidents Organization. He has made four or five appearances on television discussion programs.

546. Alfred L. Morse was born in Boston in 1903 and has been a lifetime resident of the Boston area. In 1924 he graduated from the Wharton School of Finance and Commerce, University of Pennsylvania. Alfred Morse is president and chief executive officer of Morse Shoe, Inc., Canton, Mass. He entered the shoe business in 1927 when he organized Morses, Inc. In 1961, it merged with Morse Shoe Stores Corp. (which had been established by his brother Lester and others) as Morse Shoe, Inc., which is publicly owned.

547. In 1944 and 1945 Alfred Morse served with the War Production Board as a civilian member of the Shoe and Leather Advisory Committee. Since 1962 he has been a trustee of the Combined Jewish Philanthropies of Greater Boston, and a member of the University of

Pennsylvania Committee of 1,000, organized to contribute money annually for unrestricted uses in undergraduate schools. In local and national charity drives, he was chairman of the shoe and leather division for the Associated Jewish Philanthropies fund drive from 1945 to 1949, and the United Fund Appeal in 1952; and was chairman of the retail shoe division of the "Jimmy" Fund Drive for the Children's Cancer Research Foundation. In 1963 he was appointed cochairman of the memorial program to establish an Institute of Human Relations at Boston College.

548. Alfred Morse is a counderwriter of the Lester S. and Alfred L. Morse Communication Research Institute at Brandeis University. Establishment of the institute was approved in November 1960. Among the projects of the Morse Communication Research Institute have been the following: A Multinational Communications Specialists Seminar conducted for 4 months in cooperation with the U.S. State Department; a study of UHF–TV in New York City; a study of internal publications of the USAID, and a cooperative study of the methodology of the "Voice of America" in cooperation with the U.S. Information Agency. More recently, the Morse Institute has been commissioned by the U.S. Office of Education to conduct, in conjunction with the American Academy of Arts and Sciences, a special conference on the economics of educational television.

549. Lester S. Morse was born in Somerville, Mass. in 1897 and has lived in the Boston area all his life. His home has been in Chestnut Hill since 1953. He attended Dartmouth College for 1 year and Boston University for 2 years. Lester Morse is chairman of the board of directors of Morse Shoe, Inc., Canton, Mass. He became chairman of the board of directors in 1961 when, as above noted, Morse Shoe Stores Corp., founded by him and others, merged with Morses, Inc., founded by his brother Alfred Morse, to form Morse Shoe, Inc., now publicly owned.

550. Lester Morse is a counderwriter of the Lester S. and Alfred L. Morse Communication Research Institute at Brandeis University, mentioned previously. From 1950 to 1953 he was a trustee of the Francis Ouimet Scholarship Fund, which raises money to send boys to college. Since September 1962, he has been a trustee of the Combined Jewish Philanthropies. From 1943 to 1947 he was treasurer of Belmont Country Club, and was president of the club from 1948 to 1950. He is a member of the Masons and the Shriners.

551. Alan Neuman was born in New York City in 1924 and lives in New York. He graduated from New York University in 1947 and attended the American Theatre Wing in New York in 1947 and 1948.

552. Mr. Neuman has been a television and film producer-director since 1947, and has developed new commercial program concepts. He has produced or directed programs with top stars of Hollywood and Broadway. He joined NBC–TV in 1947, when there were only 10 on the programing staff. Included among his producer-director credits are: the "Coke Specials," "Producer's Showcase," "The Colgate Comedy Hour," "The Academy Award Show," "The Kate Smith Hour," "Matinee Theatre," "Chevrolet Teletheatre," "Broadway Open House," "Lights Out," and "Inner Sanctum." He has produced about 2,000

television programs, including, in addition to those named above "Adlai Stevenson Reports," "Meet the Press," "The NBC Opera," "The Wisdom Series," "Youth Wants To Know," and "The March of Medicine." One of his television specialties is live and taped remote broadcasts—variety, dramatic, and "actuals" like the live dramatic program from outdoor locations in the series, "City at Midnight." In 1958 and 1959, as an employee under contract to the National Broadcasting Co., Mr. Neuman was producer for the television program "Wide, Wide World." In 1960 and 1961, as an independent contractor, he produced "Ellery Queen," also on NBC. In 1961 and 1962 he was producer of "Person to Person" for the Columbia Broadcasting System. In 1961 he was also producer of the Perry Como replacement program on NBC. In 1948 Mr. Neuman was one of the producers for NBC of television's first national election coverage. His "Wide, Wide World" showed the unveiling and firing of the Polaris missile, and the first live television appearance of the Atlas missile. The first live television pickups from military jet aircraft in flight, from a parachutist while descending, from an aircraft carrier and missile cruiser at sea, and from a submarine beneath the surface, also were produced by Mr. Neuman. In England he produced Sir Anthony Eden's first telecast following the Suez crisis and his resignation. One of General Eisenhower's few appearances on commercial television was produced by Mr. Neuman, as was the only commercial television appearance of Herbert Hoover, on "Person to Person."

553. In producing the first combined Armed Forces show, the 90-minute "Power for Peace," Mr. Neuman had the full cooperation and participation of every branch of the defense establishment. He also directed the first television network broadcast from Chicago, as well as the first remote dramatic telecast. He did some of the first European originations for American television, when he took "Person to Person" to England and the continent. He produced the first live television pickup from the *Nautilus;* and on the crackerbarrel sessions of the "Kate Smith Hour" he had many outstanding personalities for their first television appearance, including the then Congressman John F. Kennedy and Nelson Rockefeller. The only time that television cameras have been allowed in the U.S. Senate was on a program he produced; and he was the first to televise from the Sistine Chapel and the Pope's private gardens. On a program of his, four countries were linked live for the first time—the United States, Canada, Cuba, and Mexico. The Library of Congress requested and received kinescopes of Mr. Neuman's "Wide, Wide World," which have been deposited for the use of historians.

554. Among the 48 awards for excellence in television, radio, and film which have been awarded to programs produced by Mr. Neuman are the Emmy Award (seven Emmy nominations) and the Sylvania Award in 1958 for "Wide, Wide World"; the Christopher Award and Freedom Foundation Awards for "The Wisdom Series" (Herbert Hoover), and the Thomas Alva Edison Award in 1956 and again in 1957, for "Wide, Wide World." In 1960 Mr. Neuman was chosen one of the five producers of the year in the Radio-Television Daily 18th Annual Poll.

555. In 1961–62 and again in 1962–63, Mr. Neuman and an associate packaged and produced 320 half-hour programs over the CBS–TV network, in the series "The College of the Air." The American Economy course, offered in 1962 and 1963, probably was the largest class of all time. It was broadcast by 241 television stations, seen in all 50 States, and viewed as early as 5 a.m. and as late as 10 p.m., with at least 359 colleges and universities offering credit for the course. Presidents Kennedy and Eisenhower were two of the many notable guests on this series.

556. Mr. Neuman is an unpaid consultant, for TV and radio, for the Savings Bond Division of the Treasury Department, and a consultant for Radio Visual Services to the United Nations—Office of Public Information.

557. He served with the U.S. Air Force from 1942 to 1945, as a flying officer with the 9th Air Force in the European theater of operations, and was a Reserve officer recalled to active duty during the Korean War.

558. Constantin A. Pertzoff was born in Cheliabinsk, Russia in 1899 and emigrated to the United States in 1920. He has lived in the Boston area since 1921 and became a citizen in 1937. His home is in Lincoln, Mass. After beginning his education in Russia, Mr. Pertzoff attended Columbia University School of Architecture and was a student at the Graduate School of Architecture at Harvard University, where he received his master's degree in 1924. He spent the academic year, 1935 to 1936, as a graduate student at the School of City Planning, Department of Architecture, Massachusetts Institute of Technology; and was a Wheelwright traveling fellow in architecture, Harvard University in 1937 and 1938. He has been an architect in Boston since 1924, except during his traveling fellowship and the war. He is senior partner in the firm of Pertzoff and Quarton, Cambridge. He is also coowner and operator of a commercial apple orchard.

559. In 1959 Mr. Pertzoff was elected to the planning board of Lincoln. He was chairman of the board in 1962, and is now in the last year of his 5-year term. He is a member of Harvard's committee to visit Slavic civilizations, a position to which he has been annually reappointed by the board of overseers for the last 15 years. He is a director of the Tolstoy Foundation of New York and the Russian Theological Fund of New York; and is a member of the American Institute of Architects, the Boston Society of Architects, and the Massachusetts State Association of Architects. He is a member of the Massachusetts Fruit Growers Association, Inc. and a cooperator of the Middlesex soil conservation district.

560. Lawrence Pickard was born in Yonkers, New York in 1922, and was a resident of the Boston area from May 1961 to September 1964. As an infant and young boy he had lived for 4 years in Fitchburg, Mass. His home is in Mamaroneck, N.Y. He attended Columbia University for 2 years (1947 to 1949).

561. Mr. Pickard is an executive producer in the public affairs division of National Educational Television in New York. He has been a journalist since 1939, when he began writing for the Yonkers Herald-Statesman as a stringer. He joined the regular staff of the Herald-

Statesman in 1940, and was acting sports editor when he entered military service in September 1942. In February 1946, he entered broadcasting as a news writer-reporter for station WOR, New York City. He moved to WOR–TV in January 1952, to organize and manage its new operation. From November 1952 through April 1953, he was public relations manager for the award-winning "Omnibus" series, produced for the CBS–TV network under the auspices of the Ford Foundation. In April 1953, Mr. Pickard joined CBS–TV, and later had overall responsibility for the network's syndicated newsfilm service. He joined the NBC–TV network's "Today" show in December 1955, and was the program's overnight news editor, talent coordinator and managing editor. In May 1961, he joined the Westinghouse Broadcasting Co. as director of news and special projects for WBZ–TV, Boston, channel 4. He was writer-producer-moderator of channel 4's "Next Question" interview series; wrote and produced a number of WBZ–TV's documentaries; wrote and produced NBC–TV's "As Others See Us"; and wrote "Christmas Eve with the Garroways." From the beginning of his employment with WBZ–TV, Mr. Pickard tried to upgrade the news coverage of the station. One of the first things he did on moving to Boston was to interview all the leading officials who he thought should know him and whom he should know, and discuss area news. The officials included Governor Volpe, who talked about television with Mr. Pickard for an hour. Other persons whom Mr. Pickard interviewed in this period included the police and fire chiefs, people in organizations which were the station's sources of daily news, the fire commissioner, Boston's Mayor Collins, and the registrar of motor vehicles.

562. In January 1963, Mr. Pickard told the management of WBZ–TV of his intention to leave. The general manager of the station told him to stay as long as he wished while looking for another job; but because Mr. Pickard felt that there was a difference between himself and station management about the importance of the news operation, in early February he gave his final notice, which became effective February 22, 1963. In March 1963, Mr. Pickard joined BBI and during the remainder of 1963 assisted in the planning of the BBI project and did freelance television work. Also, until August 1, 1963, he conducted an independent public relations business, and then took some freelance assignments in New York and worked as producer-consultant for Time, Inc., broadcasting division, and as an associate producer with the special projects division of the American Broadcasting Co., on the "Saga of Western Man" series. Each of these two consecutive assignments was for the run of the project. In January 1964, following his assignment at ABC–TV, Mr. Pickard joined National Educational Television (NET). In September 1964, he moved his family to Mamaroneck.

563. In his broadcast career, Mr. Pickard has received several awards, including the Albert Lasker Award; the International Rescue Committee Award; and the UPI Broadcasters Association of Massachusetts Award. He has lectured at the Boston University School of Public Relations. He is a member of Sigma Delta Chi, professional

journalistic society; and International Radio & Television Society, Inc.

564. Mr. Pickard is a combat veteran of World War II. He was with the Office of Strategic Services, and a junior officer with the 82d Airborne Division. He was awarded the Bronze Star, the French Croix de Guerre, the Belgian Fouragerre, the Dutch Orange Lanyard, and the Purple Heart with cluster.

565. William J. Poorvu was born in Boston in 1935. He has lived in the Boston area all his life. He lives in Waban, Mass. He is a graduate of Yale College (1956), and Harvard Graduate School of Business Administration (M.B.A., 1958). While in college he formed an organization known as Age of Science, of which he was chairman of the board; it published a national magazine with a circulation of over 100,000 among engineering and science students. He stayed in this post after graduation until 1957.

566. Since 1958 Mr. Poorvu has been in the real estate business. In the first few years following his graduation from Harvard Business School, he was mainly concerned with urban redevelopment. Later he and a partner formed, and afterwards sold, a real estate rental and management office in Boston with 10 or 12 employees. Mr. Poorvu has been involved as a private developer in urban renewal projects totaling about $100 million in project values. (His own investment has been "between $10,000 and $100,000" (tr. 10197).) He has lectured extensively on urban redevelopment. He, Dr. Baruch, and Professor Bursk have joint business interests, and have worked together on the problems of economic disarmament in cooperation with the U.S. Arms Control and Armament Agency. He is a general partner in several real estate partnerships. Since 1959 he has been treasurer and 40 percent owner of the Chamberlain Management Corp.; and since 1962 a director of Poorvu Real Estate Corp. Since 1962 he has been president of Essex Capital Corp., a small business investment company, and a director and holder of a minority interest in First Bank & Trust Co. of Needham.

567. He has solicited money for the United Fund, the Combined Jewish Philanthropies, and the American Cancer Drive. He is a member of Freedom House, a Negro community house in Boston; and of the Newton YMCA and the Harvard Business School Association of Boston. Since 1963 he has been a member of the Director's Club of Boston, a nonprofit group supporting the Home for Little Wanderers, an orphanage and child guidance and treatment center. He is on the club's ways and means committee. Recently he became a member of the World Affairs Council, and was appointed to the executive committee of the American Jewish Congress.

568. Edwin H. B. Pratt was born in Glen Cove, N.Y. in 1913 and has lived in the Boston area since 1947. His home is in Cambridge. He graduated from Harvard College in 1936. From 1936 to 1937 he attended Harvard Law School.

569. Mr. Pratt has been headmaster of the Browne & Nichols School, Cambridge since 1949. He taught at Westminster School, Simsbury, Conn., from 1937 to 1943. After his discharge from the service he helped to organize the American Veterans Committee of Massachu-

setts, of which he was State chairman. In the fall of 1947, on completing his term as chairman of AVC, he became administrative assistant to Governor Bradford and continued in that position throughout 1948. He was disaster chairman of the Boston Chapter of the American Red Cross from 1947 to 1949.

570. Mr. Pratt is trustee of Boys' and Girls' Camps, Inc., and is on the board of the Museum of Science. He is a member of the corporation of Peter Bent Brigham Hospital; the Cambridge Civic Unity Committee; and a trustee of the Episcopal Theological School in Cambridge. He is a member of the following professional societies: the Independent School Association of Massachusetts (elected president in 1963); New England Association of Colleges and Secondary Schools; Educational Records Bureau; the Headmasters Association; and the Country Day School Headmasters Association.

571. Mr. Pratt was in the U.S. Navy during World War II. He was CIC officer on a destroyer which was sunk in action off Okinawa.

572. Alford P. Rudnick was born in North Adams, Mass., in 1906. He has lived in the Boston area since 1915. His home is in Brookline. Mr. Rudnick attended Tufts College and graduated from Harvard College (1926) and Harvard Law School (1929). Mr. Rudnick is an attorney and a partner in the law firm of Brown, Rudnick, Freed & Gesmer in Boston. He has been in the private practice of law in Boston since his graduation from law school. He was admitted to the Massachusetts Bar in 1929 and later to the Federal Bar. In connection with his law practice he has been an officer and director of a number of corporations. He is a member of the Boston Bar Association, Massachusetts Bar Association, and American Bar Association. He is also a director of the Massachusetts Council for Abolition of the Death Penalty.

573. Louis P. Smith was born in Chelsea, Mass., in 1897 and has lived in the Boston area all his life. His home is in Chestnut Hill. Mr. Smith, who was in the textile industry as a young man, has been retired since 1950, but maintains an office in Boston. In 1932 he participated in the formation of the Fleisher-Smith Co., Inc., and in 1935, the L. W. Guild Co., Inc. Both of these textile companies ceased operations in 1950.

574. Mr. Smith is past president of the Combined Jewish Philanthropies of Greater Boston, 1957 to 1962, and was general chairman of the Combined Jewish Appeal from 1954 to 1955, when several million dollars were raised in the area. He was appointed a trustee of the Boston City Hospital in 1962; has been a cabinet member of the United Jewish Appeal since 1961; was a trustee of the Massachusetts chapter of the National Multiple Sclerosis Society from 1952 to 1963; has been a trustee of the United Hias of New York since 1952; and a member of the Massachusetts Governor's Commission on Refugees since 1962. He was president of the Boston Service for New Americans from 1951 to 1954. Mr. Smith has been a member of the Council of Jewish Federations and Welfare Funds (New York) since 1960, and a trustee of the American Joint Distribution since 1958. In 1952 he was appointed a trustee of the Hebrew Teachers College and the Beth Israel Hospital, and was made a fellow of Brandeis University in

1959. He has been a member of the board of overseers, The Florence Heller Graduate School of Advanced Studies in Social Welfare, Brandeis University, since 1959. In 1963 he was appointed a vice chairman of the United Fund, and a member of the advisory committee, Boston Redevelopment Authority. Also, in 1963, he was made a director of the Lincoln Filene Civic Education Foundation Center at Tufts University.

575. Mr. Smith has appeared on radio and television. In 1963 Mr. Smith received an award for dedicated service to his fellow men from the National Conference of Christians and Jews. He is a life member of the Association for the Advancement of Colored People. For over 40 years he has worked for the well-known Ford Hall Forum and has been its treasurer since 1963. The Ford Hall Forum, founded in 1908, is a group of Boston area residents, organized without regard to economic, religious, or political differences to discuss any matter of public interest under the guidance of speakers invited from all parts of the world, all in the interest of truth, fair play, and mutual enlightenment with full opportunity for participation by the audience (exhibit 1–B). The forum over the years has been attended by more than 1,600,000 people.

576. Mr. Smith was in the U.S. Navy in World War I; and in World War II was a major in the Chemical Warfare Service in the Army.

577. Julian D. Steele was born in Savannah, Ga., in 1906. He was a resident of Boston from 1915 to 1943 and has lived in West Newbury, Mass., about 25 miles from Boston, since 1943. He is a graduate of Harvard College (1929, cum laude). He attended the New York School of Social Work in 1930 and 1931.

578. Mr. Steele has been a consultant to the Boston Regional Planning project since 1962. From 1931 to 1938 he was director of the Robert Gould Shaw Settlement House in Boston; and from 1939 to 1950 was executive director of the Armstrong Hemenway Foundation, a Boston charitable foundation. He has been a trustee of the Walnut Real Estate Trust since 1950. From 1954 to 1959 he was a member of the Massachusetts Parole Board. He was an intergroup relations specialist from February 1960 to July 1960, and a principal assistant administrator for region I (New York and New England), Housing and Home Finance Agency, from July 1960 to 1962.

579. Mr. Steele has been the town moderator of West Newbury since 1952. He was a member of the general council, Congregational Christian Churches, from 1954 to 1958. He was president of the Urban League of Greater Boston (1960–62), and was president of the Boston Branch of the NAACP from 1943 to 1947, and was a national director of that organization from 1946 to 1949. He was a member of the board of directors of the National Conference of Christians and Jews, northeast region (1955–60); and of the standing committee of the Boston Latin School Association (1946–49). Between 1940 and 1962 he was a member at all times of either the executive committee or of the advisory committee of the Massachusetts Civil Liberties Union. In October and November 1963, respectively, he became a director of the World Affairs Council and the United Prison Association. Mr. Steele has been active

in the work of the Ford Hall Forum for over 30 years and since 1954 has been a member of its council.

580. Mr. Steele has made many appearances on discussion programs on television and radio. Beginning about 1955 he participated weekly for some 4 years as a member of a panel on a series of radio programs sponsored and produced by the Massachusetts Council of Churches. Other appearances have included many public affairs programs.

581. Mrs. Eunice West was born in Cambridge in 1923 and lived in the Boston area during her first 23 years. She then lived in Ohio for 5 years and in Brazil for 6 months, returning to the Boston area in 1952. Since then she lived in Plymouth, Mass. for 8 years and for the last 2 years in Hingham, 20 miles from the center of Boston. Mrs. West attended the Massachusetts College of Art from 1941 to 1943. In 1961 she received certificates for completing an effective writing course at Northeastern University, and an advertising course conducted by the Advertising Club of Boston. Since 1961 Mrs. West has been director of public and internal relations and assistant manager, and acts as an executive coordinator for Charles River Park, a Boston apartment house development. Charles River Park is one of the largest urban redevelopment projects in Boston.

582. Mrs. West was employed by the General Electric Co., Pittsfield, Mass., as small parts machine designer in the works laboratory in 1943 and 1944; and was assistant manager of the Kendall Shoe Co. in Cambridge from 1944 to 1946. In 1946 and 1947 she was public relations and promotions director at International Shoe Machine Corp., Cambridge. From 1956 through 1959 Mrs. West was women's program director for radio station WPIM, Plymouth, Mass., spending much of her radio time on "public service" programing. For 3 years of this period she had a half-hour radio program on which she interviewed in all more than 100 persons. From 1953 to 1956, and 1959 to 1961, she spent March through October as manager of a large summer resort, White Cliffs, at Plymouth.

583. Mrs. West organized the League of Women Voters of Plymouth in 1956 and was its president from 1956 to 1959. She is now a member of the Boston league. From 1947 to 1949 she was a director of the Plymouth Chapter of the Red Cross; vice president of the Jordan Hospital Club in Plymouth; and a member of the Antiquarian Society and of the Pilgrim Society. She has taught Sunday School at the First Parish Unitarian Church in Plymouth. She has written and produced several musical fund-raising skits for the church and for the League of Women Voters. She was a member of the Regional School Study Committee of Plymouth during 1958 and 1959, and is an active member of the March of Dimes and the Publicity Club of Boston. While living in Ohio, from 1947 to 1952, Mrs. West appeared in many productions of the Dramatic Club of Kenyon College and was a member of its costume committee. She taught art classes during the summer, organized a nursery school, and was a troop leader of the Brownies.

584. Barry Wood was born in New Haven in 1909. He lives in New York City. He graduated from Yale College in 1930.

585. Mr. Wood is executive producer for television with Henry Jaffe Enterprises, Inc. On graduating from Yale he became a singer.

He starred on "Hit Parade" and "Palmolive programs", and made personal appearances throughout the country from 1939 to 1947. He entered television in 1948 for the Columbia Broadcasting System in New York City as a producer-director-performer. From 1948 to 1950 he was head of musical programing for CBS. From 1950 to 1953 he was producer of the "Kate Smith" daytime and nighttime programs for the National Broadcasting Co. He then became director of color television programing at NBC until 1954. He was director of special events in the Public Affairs Department of NBC from 1954 to 1956; coproducer of the National Political Conventions in Chicago and San Francisco, in 1956; and from 1955 to 1958, was executive producer of the television program "Wide, Wide World". In 1959 he was executive producer of the Coca-Cola specials, "America Pauses"; and on July 10, 1962, produced the first Telstar Communications Satellite telecast for A.T. & T. Since 1959 he has been executive producer of "The Bell Telephone Hour on NBC. Programs produced by Mr. Wood have won many awards, including a special Sylvania Award, an Emmy Best Engineering Award, and a Billboard Award.

586. During the war years Mr. Wood participated in the war savings bond tours for the U.S. Treasury Department. He introduced "Any Bonds Today?"—Irving Berlin's theme for the Treasury Department.

587. *Officers and Directors.* The officers of Boston Broadcasters, Inc. are Leo L. Beranek, president; Matthew Brown, chairman of the board; Nathan H. David, executive vice president; William J. Poorvu, treasurer; and Joshua A. Guberman, clerk. The directors are Matthew Brown, chairman; F. William Andres; Jordan J. Baruch; Leo L. Beranek; Richard S. Burdick; Nathan H. David; Robert G. Gardner; Oscar Handlin; and William J. Poorvu. The only officer who is not a stockholder is the clerk, Mr. Guberman.

588. Joshua A. Guberman was born in Boston in 1920. He has lived in the Boston area all his life, now in Newton. He graduated from Harvard College in 1942 and from the Harvard Law School in 1948. He is an attorney, and has been associated with the law firm of Brown, Rudnick, Freed & Gesmer, Boston, or its predecessor firm since he was admitted to the Bar in 1949. As an attorney he has been an officer or director of several business corporations.

589. *Preparation and Planning.* In preparing for its application the BBI group discussed the desirability of obtaining information about the population and characteristics of the proposed service area. Messrs. Poorvu, Guberman, Brown, Handlin, David, Baruch, and Beranek met with Dorn McGrath of the Planning Services Group of Cambridge, to discuss the possibility of preparing a study of the area's population characteristics. It was decided to have the study made. Mr. McGrath was a partner of the Planning Services Group, the largest planning consulting firm in New England (he has since resigned to become an urban planner with the Urban Renewal Administration of the Housing and Home Finance Agency). The staff of the Planning Services Group at that time numbered about 40. Five of these, who were trained or experienced in the planning field, participated in the BBI project. The study, which became BBI exhibit 3–E, attachment

6, was prepared under the personal supervision of Mr. McGrath, who "was the point of contact for my firm with the BBI" (tr. 8369). At BBI's direction, Mr. McGrath called the survey a "demographic study"; he admitted that it was "not in the strict sense" a demographic study (tr. 8481), as it contained data beyond the population survey of such a study.

590. The Planning Services Group's work on the survey began in January 1963. The area to be studied was defined on a map of the statistical population areas to be served, supplied by Mr. David to Mr. McGrath around February 1, 1963. Draft reports of the survey were submitted to Mr. David in March 1963, and circulated to the stockholders. The substance of the final report was made available to the group in April 1963. BBI members had access to drafts of the report between March 1963, and the summer of that year; and in August the report, in the form in which it appears in BBI exhibit 3–E, attachment 6, except for pagination, was submitted. Also in August, Dr. Handlin and Mr. Burdick gave to Mr. Jaffe and discussed with him "various materials" (tr. 8627) from the demographic study. Materials in the study were taken into account in some programing decisions.

591. *Monitoring and Newspaper Surveys.* Early in January 1963, members of the group which became BBI decided to monitor all television programs in Boston for 1 full week; the monitoring was done during the week of January 24 to January 30, 1963. It was extended for an additional week on channel 5 alone. Mr. David worked with the persons doing the monitoring, deciding how it was to be done and the kind of information to be drawn from the raw material. Mr. David's objective was to get an intensive study of a segment of the programing being offered to the Boston area to learn "what gaps there were, if any, in satisfying the needs that we believed existed, or might have reason to believe later existed, and also, of course, to find out what we could about the operation of channel 5 by WHDH–TV" (tr. 6007). The group spoke to Dean Wiebe of the Boston University School of Public Communications, who had graduate students available for monitoring work. The group asked Dean Wiebe for an early report, "as accurate as possible" (tr. 6381–2). A 133-page report on the monitoring, by Dr. Earl Barcus, containing an analysis of television programing and advertising matter on the four stations during the period covered, was submitted in April 1963.

592. The group also authorized Dean Wiebe to have a study made of coverage of television programing by daily newspapers within a 40-mile radius of Boston for a month beginning on January 14, 1963. This resulted in a 116-page report by Dr. Edward J. Robinson, dated May 1963. The report contained, among other items, a section on promotion of programs; a section on suggestions for programs by TV editors; and a section on comments in TV columns in the area, on news stories about programing, and on the reaction of the public to programing.

593. *Reference Material.* In testimony and its proposed findings BBI refers to three books examined and discussed by its principals during the preparation of its proposal. They are "TV, The Big Pic-

ture"; "The People Look at Educational Television"; and "The People Look at Television" by Steiner. (Dr. Knowles did not see "The People Look at Educational Television" until a few weeks before the hearing. He thumbed through it but did not read it.) Mr. Feldman also talked in New York City to Arbitron and Nielson. Arbitron gave him its monthly compendium, which he sent to Boston.

594. *Formal and Informal Interviews.* BBI stockholders, and in some cases persons specially engaged, conducted formal and informal interviews with "opinion leaders," representatives of public service organizations, and others in the proposed service area. By "opinion leader" BBI means a leader in community life, charitable institutions, education, business, or the arts. "Formal" interviews were those conducted with a form questionnaire; the interviewer tried to have all the questions answered. The original questionnaire used in the formal interviews was prepared in January 1963. It contained a list of programs, with brief descriptions, then under consideration. Although the form itself was not changed, interviewers were instructed to use new or modified program proposals in posing questions about specific programs. Dr. Handlin testified that "the most important indication we wanted from the interviews was the spontaneous reactions of people if they could be brought to think about the question of what ought television to be rather than the question of what is it now, and so on" (tr. 7453).

595. The original, unedited written results of the formal interviews were kept in BBI's offices, where they were looked at by any of the principals who dropped by. Reports on formal and informal interviews also were made at meetings of the group. For instance, Mr. Gardner testified that at meetings of February 16 and 27, and March 23, 1963, he "recall[ed] seeing interview material and program material outlines" (tr. 8825). Summaries of the interviews for the hearing exhibits were prepared by Mr. David and Mr. Burdick, not by the persons who conducted the interviews.

596. BBI conducted some 77 formal interviews, and more than 70 informal ones. Of BBI's 30 stockholders, 18 participated in the interviews. Mr. Poorvu testified that as early as December 1962, members of the BBI group had discussed "the question of interviewing various community leaders and * * * the possible questionnaire that we would take with us when we interviewed people" (tr. 10063). Judge Brown testified that "it was quite obvious to all of us that if we were going to find out what the needs of the community were and the kind of programing that we ought to have on a local basis * * * we had to get beyond our own thinking and inquire from people in the community * * *" (tr. 8194). The group compiled a list of several hundred persons it considered opinion leaders in the Boston area. Dr. Baruch testified that the group recognized that the responsibility to assess and serve "needs" must remain with the station operators and cannot be delegated, and that "we can get from the opinion leaders statements as to what they see as the needs of the community" (tr. 9079–80).

597. Although most of the formal and informal interviews were in the Boston area, Mr. Pickard, who engaged in both types, also

interviewed persons in Manchester and Concord, N.H., and Worcester and New Bedford, Mass., within the proposed station's area.

598. In its proposed findings (step I, par. 172), BBI writes: "Changes and adjustments in some of the proposed programs resulted from the interviews * * *; and all of the programs in the proposed typical week were in some manner influenced by the results of the community contacts made by BBI members or their representatives * * *."

599. *Circulation of Programing Questionnaires.* The group, in its own estimation, had through its studies acquired adequate knowledge of the Boston area. But because the demographic study showed that half of the people in its proposed viewing area lived beyond the city and its environs it was decided to circulate a questionnaire in the more distant parts to learn about them. It developed on cross-examination, however, that presidents of several colleges in the Boston area received the questionnaire, though not those of MIT or Harvard. In May 1963, BBI circulated 1099 written questionnaires. The recipients included mayors, selectmen, police chiefs, public welfare directors, county agents, park superintendents, board of health directors, planning board directors, League of Women Voters editors, school superintendents, school heads, museum directors, college presidents, librarians, and religious leaders. Although there was some circulation within the Boston area, generally it was outside the area bounded by Route 128. The questionnaires were prepared and the recipients selected with the help of Cambridge Editorial Research, Inc., a professional survey organization which had been formed by persons prominent in the community and nationally. Early in the project, BBI explained to the Cambridge personnel the purpose of the circulated questionnaire. It was decided that five different forms of questionnaires should be sent, each hopefully adapted to the category in which the recipient fell. The questionnaires referred to particular described programs (none, it would seem, unfavorably depicted), and asked for responses on need, resources, and possible participation by the recipient or his organization. In each case the respondent could answer "yes," "no," or "no opinion." The questionnaire included 19 programs.

600. Of the 1,099 to whom questionnaires were sent, 232 or 21 percent replied. In the returned questionnaires, as to all but three programs over 60 percent of the respondents answered "Yes." The questionnaires, as above indicated, were simply constructed. They described a proposed program or programs and inquired of the recipient whether the program or programs filled a need in the community. He was not asked what need would be filled, nor whether it was being met by current programs; and was not given any choice of programs to decide which would best fill the "need." Mr. David knew, when the questionnaires were mailed, of the built-in bias in such surveys because of a respondent's desire to express positive judgments, and that this bias was described in the book, "The People Look at Educational Television." Because a-less-than 60 percent affirmative response was regarded as "lukewarm" (tr. 6032), BBI changed the described format of the three programs and in October 1963, sent out 119 more questionnaires with a covering letter to librarians, school heads, college

presidents, school superintendents, and religious leaders who had responded to the previous questionnaire. This time 72 questionnaires were answered, or over 60 percent, and the changed descriptions drew a much greater affirmative response than the original versions.

601. Mr. Poorvu discussed the questionnaires and the responses at many informal meetings and by telephone with members of the BBI group. There was also discussion in formal meeting of the "requirements of the Boston area" (tr. 8622).

602. *Program Advisory Committee.* By December 1962, members of the group began discussing the advisability of a program advisory committee. They again discussed the matter at meetings on February 16 and 27, 1963. Suggestions for membership on the PAC were made by various BBI principals. Mr. Pickard testified that they "agreed that the objectives of the Program Advisory Committee would be to extend the knowledge and expertise of the stockholders and the staff and to bring areas of knowledge where we may have needed outside advice and to continually advise us as to the program needs of the community"; and that they "tried to get a good cross section of the community as to background, religion, interests. We probably, I think, didn't seek to duplicate the kind of people that were in the [BBI] group" (tr. 10014). In March 1963, the PAC was set up with 19 members under the chairmanship of Professor Handlin. They are identified with government, labor, education, the arts, medicine, religion, and urban renewal. They include a Negro and adherents of various religions, four of whom are clergymen. Rabbi Cohon, however, did not attend any committee meetings, and Dr. Madsen attended only one. PAC members were invited to join the group as stockholders and some did; and some who originally were asked to be stockholders became members of the PAC.

603. The PAC met six times in 1963. The first meeting, a dinner meeting on March 20, 1963, was the longest, lasting 4¼ hours. Descriptions of all programs formulated by the time of a particular meeting were distributed, as ultimately were the exhibits prepared for presentation here. Professor Handlin kept the minutes. Sometimes BBI stockholders attended PAC meetings. If a PAC member missed a meeting, BBI stockholders who knew him best were asked to fill him in. Asked whether the PAC "had made a significant contribution to the program planning proposals of BBI," Professor Handlin replied that they had, "at the meetings, those they attended, and outside the meetings in various personal contacts they gave us the insight into the needs and problems of the community and the way in which television presentations could help satisfy those needs" (tr. 7659). Three PAC members attended two meetings, eight only one meeting, and three attended none. The record does not indicate the frequency of attendance of the other members, nor the overall attendance at the six meetings.

604. *Continuing Survey.* BBI plans to make periodic surveys of community leaders and telephone surveys of viewers. The community leader survey would be conducted by Dean Wiebe, who expected to be able to use "those facilities which Boston University normally makes available to members of its faculty for such consulting" (tr.

9026), at an estimated charge of $10,000 a year. A program "Sound Off!" is proposed with the objective of giving viewers "an opportunity to express directly to station management their opinion of the programs they have seen and their suggestions of what they would like to see. A secondary purpose will be to acquaint viewers in a meaningful manner with the services and functions of the station" (proposed findings, step I, p. B–21). The telephone survey would be made in conjunction with a computer system devised by Bolt, Beranek & Newman to analyze virtually instantaneously the responses of as many as 3,000 viewers. They would be called and asked questions, and would respond not orally but through the dial on their telephones. The computer would monitor and process the incoming dial clicks. The use of a computer for a telephone survey is relatively untried. BBI plans to televise an annual report to viewers, and to publish periodically in area newspapers a ballot form on which viewers can vote for their favorite programs. It also proposes an "AB–X Survey," in which persons interviewed will be asked to judge a new synopsized program (X) by placing it on a scale polarized by established programs A and B. In the opinion of Dr. Baruch, who is an expert in this field, the AB–X technique provides "more objective statistics about interrelationships" than a direct comparison would (tr. 9066). The AB–X survey is relatively new for television, and in the first year its use would be largely exploratory.

605. *Stockholder Participation in Planning.* BBI stockholders participated in varying degrees in the planning of station operation and programing. There were 25 formal meetings at which minutes were kept, as well as discussions about programing in smaller groups. Mr. David estimated that the proposed typical week went through at least 25 drafts. Among items circulated to each stockholder were copies of the original application and of each amendment, and of competing applications. Case exhibits were furnished each stockholder, as were some competing exhibits.

606. BBI sets out "summaries of significant aspects of the preparation and planning activities of every BBI stockholder who testified at the hearing" (step I, par. 193). The following summarizes the more important of these summaries (it should be understood that all attended BBI meetings and that these will not be specifically mentioned except in certain cases).

607. Dr. Beranek, a communications engineer, made sure of the technical soundness of the application; and discussed aeronautical clearance of the site with FAA, equipment questions with supplier and engineers, and adequacy of the studio with Mr. Burdick. He found the studio site and drew up studio plans, drawing on his experience in the field. With Dr. Baruch he developed the administrative structure and was active in program planning. He and Dr. Baruch developed the BBI stock-participation plan for employees. He suggested the proposed 24-hour operation.

608. Dr. Handlin took the lead in proposed programing. He wrote the original drafts of the BBI policy statement and proposed or helped develop certain programs. As already stated, he is chairman of the PAC.

609. Judge Brown's participation has in general been in meetings, formal or informal, in reviewing studies, and in helping to plan surveys.

610. Mr. David, as above mentioned, spent the equivalent of a normal workweek on BBI, while active as a lawyer in other matters. He participated in the decision to monitor local television and helped in the work itself. He also helped plan surveys, participated in program planning discussions, was a kind of general post office for the distribution of material to stockholders, and substantially contributed to the preparation of BBI's exhibits.

611. Messrs. Jaffe, Wood, and Neuman helped in the development of proposed programs. For about a week in the summer of 1963 they put aside their other work for BBI. Mr. Burdick and Mr. Jaffe met almost every day in August 1963, to work on the program schedule.

612. Mr. Gardner and Dr. Baruch participated in many program discussions and developed some programs. Dr. Baruch wrote the original draft of BBI's continuing survey proposal, and worked on the policy statement.

613. Martin Hoffman suggested a segment of a program and obtained data on the 24-hour operation proposal.

614. Mr. Pickard worked full time for BBI from May through July 1963, and part time into September 1963. He contributed to the program proposal and conducted many formal and informal interviews.

615. Mrs. West conducted nine formal interviews and participated in program discussions.

616. Mr. Andres conducted one formal interview and several informal ones. He suggested two PAC members.

617. Mr. Poorvu worked on programing, on basic policies, and as treasurer on banking problems; had supervisory responsibility for the budget; and computed BBI's projected income figures. He helped plan the demographic study and circulate programing questionnaires, and conducted interviews. He helped prepare exhibits.

618. Mr. Burdick has been deeply involved in the preparation. He came to Boston to work full time on BBI in December 1963. Among other things, for the original application and the amendments, he worked with Dr. Beranek and Mr. Pickard to walk through the proposed typical week to determine its feasibility. He participated in the preparation of the original application and all amendments.

619. *Effect of Community Contacts and Programing Questionnaires.* It is impracticable to repeat the generalities BBI recites in its proposed findings to show that the contacts and surveys influenced its program proposal (see par. 598, above). A more detailed matter, relating to its religious programing, may be mentioned, however. In this field BBI has had the assistance of Dr. Truman Madsden, president of the New England Mission of the Church of Jesus Christ, Latter Day Saints (the Mormon Church). He is a member of the PAC. His doctorate is in comparative religion, and he has experience in the planning and production of television religious programs. In the summer of 1963 he became BBI's religious programing consultant. His headquarters has approved the consulting assignment. After

examining the descriptions of programs as they had been developed to that time, he reported his analyses to Professor Handlin, who incorporated them in his written report. Dr. Madsden also met with the PAC and several BBI stockholders; he suggested changes to them which were then made in the proposed BBI religious programs. Nine theologians have agreed to participate in BBI's religious programs. Dr. Madsden was an associate professor at Brigham Young University when he was assigned to the New England Mission for a 3-year period which ended September 15, 1965. He has tenure at Brigham Young, but after expiration of his leave of absence he had to return, lose his tenure, or get an extension. As the principal record was closed before September 1965, there is no evidence as to the alternative Dr. Madsden took.

620. *Twenty-four Hour Operation.* BBI proposes "to provide service during the normally nonoperating hours of 1 to 6 a.m. for five mornings a week, Tuesday through Saturday" (exhibit 3–D). It concluded that there was a potential audience sufficient to justify the operation. It relied on Dr. Beranek's observation of a Chicago 24-hour station and a study by Mr. Hoffman which showed: the five Boston AM stations which operate around the clock; the number of first, second, and third shift workers at three Boston plants and the number of employees who work all night at the Boston airport; the time of the last flight out of the Boston airport in the early morning and the time of the first morning flight; the times of the last arriving and departing trains at Boston's north and south stations; and the fact that buses arrive and leave from the Boston Greyhound terminal all night. It did not include in its questionnaires, however, any inquiry whether the respondent would be interested in watching television between 1 and 6 a.m. BBI writes (exhibit 3–D) that it "is proposed to use this period to experiment with programing, to repeat local live programs presented during normal hours and to provide current news." In the experimental program, among other things it is proposed to present television-drama classes and occasional foreign taped or filmed television programs. (Although, as noted, some Boston radio stations operate 24 hours a day, there was no report on how they handle their maintenance. No Boston television station now operates 24 hours a day.)

621. *Stated Policies.* BBI first reduced its program policies to writing when Professor Handlin joined the group in February 1964. He prepared a memorandum "that was circulated to a substantial number of the members of the group" (tr. 7363). It became the basic document for the BBI policy statement, which also embodies the suggestions of other stockholders. Several drafts preceded the final version which was adopted by the stockholders and introduced at the hearing as BBI exhibit 2.

622. BBI declares (exhibit 2):

> We do not regard the audience to be served as simply an indiscriminate mass of viewers; nor do we believe that it is necessary to aim at a common denominator, especially the least common denominator * * * Boston Broadcasters, Inc. is committed to avoiding the gross uniformity of television programing which implies an insensitivity to any facet of its audience except quantity * * * it proposes to keep free extra time for programs of local origin and for exchange

offerings of other stations * * * To improve its future programing, and as part of its program of maintaining close relations with the community, Boston Broadcasters intends to cooperate with the nearby schools and other organizations engaged in research and in training personnel for work in television * * * Scheduled programs will be preempted when the broadcast of special events or other special programs appears to be desirable. The discussion of all legitimate points of view on controversial subjects will be a prime objective of the station's operation * * * All local studio originated programs will be broadcast in color. For 5 days a week, the station will operate 24 hours a day. Time will not be sold for religious or nonnetwork political broadcasts. [Charles River contends that the free local political time policy is impracticably "inflexible" (step II: Opposition Findings, p. 93). BBI feels that station control over allocation of political time is greater under its plan than if it should offer to sell time to candidates with varying abilities to pay. The question cannot be decided now, but must be settled by experience.] During political campaigns free time will be made available to local competing candidates for the discussion of campaign issues. The station will subscribe to and adhere to the NAB Code as a minimum standard of performance. Commercial continuity and spot announcements will be limited to 1 minute in length and normally to no more than three spot announcements in any 14½-minute period * * * The applicant plans to make available to key staff members of the operating group an opportunity to participate in the ownership of the station up to an aggregate of 25 percent * * * The station will broadcast editorials regularly during its program schedule * * * The editorials will be written by specially trained personnel * * * The decision whether any given editorial will be carried will be that of an editorial board of five, consisting of the president of the corporation, the general manager, the chairman of the program advisory committee (all of whom are directors of the corporation), and two stockholders who will serve on the board on a rotating basis. In the event of a marked disagreement among members of the board as to the position the station should take, the subject will be referred to the general manager for consideration as to the theme of a discussion program. The news programs and editorial policy is the subject of a separate statement (exhibit 3–C). BBI proposes to broadcast news about 22½ hours a week, 15 of these locally produced. It plans a News and Public Affairs Department of 44 people under Lawrence Pickard as the director; and to hire a Washington correspondent "and to make arrangements for film coverage, each week, of events and interviews in the Nation's Capitol [sic] which will be of particular point and substance for viewers in the proposed service area." Its reporters, editors, and newscasters will, at all times, be charged to gather the news accurately, impartially, rapidly, and completely * * * Copies of editorials in conflict with those [sic—apparently what is meant here is the known opinions of the personalities themselves] of public persons will be distributed to such persons in advance of broadcast. Opportunities for reply will be offered for the airing [sic] of responsible, opposing viewpoints.

623. BBI asserts that in its commercial policy it has attempted to reconcile its objective of running not an artsy-craftsy station but a good solid commercial station with its duty to serve the public. It declares that its principals will not draw out maximum profits, but will plow them back to improve programing (its principals have no apparent knowledge of the actual profits of the Boston TV stations). Dr. Baruch felt that a commercial station like BBI's could improve on the attempts of educational stations, hampered as the latter are by lack of money. BBI expects no difficulty in affiliating with a network.

624. *Proposed Programing.* BBI breaks down its proposed typical week by source as follows:

	8 a.m. to 6 p.m.	6 to 11 p.m.	All other	All hours
1. Network commercial (NC)	50.6	65.0	14.8	41.4
2. Network sustaining (NS)	3.4			1.5
3. Recorded commercial (RC)	8.3	1.4	11.1	7.8
4. Recorded sustaining (RS)	1.3		10.0	4.0
5. Wire commercial (WC)				
6. Wire sustaining (WS)				
7. Live commercial (LC)	22.2	20.0	39.1	27.6
8. Live sustaining (LS)	14.2	13.6	25.0	17.7
9. Total commercial (1, 3, 5, 7)	81.1	86.4	65.0	76.8
10. Total sustaining (2, 4, 6, 8)	18.9	13.6	35.0	23.2
11. Complete total	100.0	100.0	100.0	100.0
12. Actual broadcast hours (per week)	70	35	55.5	160.5
13. Number of spot announcements (SA) (per week)	328	164	164	638
14. Number of noncommercial spot announcements (NCSA) (per week)	115	60	102	277

NOTE.—Included in the above figures are 875 minutes of live programing repeated by means of tape. Such repeats constitute 9 percent of the weekly schedule. The figure for spot announcements—638—does not include promotional announcements for commercial programs.

625. BBI analyzes its proposed typical week by type as follows:

	Percentage
1. Entertainment	53.3
2. Religious	2.2
3. Agricultural	1.4
4. Educational	7.3
5. News	14.2
6. Discussion	6.3
7. Talks	14.6
10. Miscellaneous	.7
Total	100.0

626. Local entertainment programs proposed include regularly scheduled features for adults, teenagers, adolescents, and preschool children in early morning, afternoon, and prime evening hours. There are music, drama, variety, quiz, travel, and recreation, films, cartoons animation, puppetry, games, community history and current affairs, and audience participation programs. Included among the programs are four of the proposed BBI specials: "Television Workshop," "This Hallowed Ground/Progress Report" (actually two distinct programs), and "Words and Music."

627. *Entertainment Programs.* Following a general discussion of its programing in succeeding paragraphs is a brief description of some of BBI's proposed local programs not otherwise described in the general discussion or supplementing previous mention.

628. Four BBI members are professionally interested in music. In the proposed BBI entertainment programs are three series which consist largely of music. They are "By Popular Demand," "The Television Workshop," and "Words and Music." The last two are among the proposed BBI specials. "Television Workshop" will experiment with new forms and techniques, operatic and instrumental (Miss Sarah Caldwell, who had been an associate of Dr. Beranek's in the Boston Opera Group, Inc., when he was president, and is an opera director, has told him that she would be glad to stage two or more operas a year for BBI). "Words and Music" "will follow the musical scale in its range and variability" (exhibit 3–C, p. 84). "By Popular Demand,"

which will be a syndicated production of Henry Jaffe Enterprises, Inc., will feature folk and everyday music. "Away From it All," a woman's program, will at times have segments or entire programs "devoted to the songs of a given land" (exhibit 3–C, p. 3). Hymns will be sung on "Children's Religious Program" and "Praise the Lord." On "Family Journal" instrumentalists, singers, and folk artists will be invited to showcase their talents (exhibit 3–C, p. 26). As specials, BBI proposes to broadcast Boston Symphony Orchestra concerts, filmed or taped events of the annual Boston Arts Festival, and carol groups at Christmas, among many others.

629. *Religious Programs.* It has already been noted that BBI will not sell religious time. It proposes about 3½ hours of sustaining religious programing weekly, of which 39 minutes are prayers (presumably at sign-on or off), 1 hour network religious, and 1 hour 50 minutes local religious. On a 10-minute Monday–Friday program, "I Believe," "a well-known or accomplished person [lay or religious] will discuss his ultimate convictions and how they relate to his daily life" (exhibit 3–C, p. 37). "One World" will offer speakers of various faiths on Sundays. Their talks will be "illustrated with appropriate art, music, and drama" (exhibit 3–C, p. 45). A half-hour Sunday program, "Praise the Lord," will "demonstrate the ceremonies and liturgical practices of different religions, with explanations of their significance, in a quest for interfaith understanding," through studio presentations or remote pick-ups (exhibit 3–C, p. 50). BBI proposes to carry masses periodically, and to have Catholic segments on programs like "One World" and "Family Journal." BBI's "Children's Religious Program" is described below.

630. *Educational Programs.* Classed by BBI as educational are the series "The Humanities," twice a day for 30 minutes, Monday through Friday, a direct instruction course for credit; "Insight to Science," a 30-minute once-a-week program, explaining and illustrating new scientific developments; and one-third of a children's program, "Open the Door," 30 minutes Monday through Friday, designed to interest children in science and the arts. Two Harvard faculty members of the BBI group, Drs. Handlin and Holton, have stated their willingness to help plan the Humanities series (exhibit 3–C, p. 36). Dr. Holton and Dr. Baruch, who is a lecturer at MIT, will be two of the master teachers * * * who will rotate on "Insight to Science" (exhibit 3–C, p. 41). Another BBI member, Mr. Gardner, who is an anthropologist and film maker and on the Harvard faculty, will be host on the 60-minute "Sunday Realities," a program of documentary films. As vice president of an international committee on ethnographic film, he has access to material to be used on the program. Classed as one-ninth educational is "Screening Room," which will provide a showplace for a wide variety of filmed and taped programs which otherwise have no television audience, many of which are produced by students of television and related fields and others experimenting in the art (exhibit 3–C, p. 61). Mr. Gardner will help to prepare the program and obtain films, and three other BBI members, Messrs. Jaffe, Wood, and Neuman, will be consulted on its presentation. (Mr. Gardner will be host for at least some of a children's entertainment program, "World of

Wonders," 30 minutes on Saturday; he and Mr. Neuman will advise on the selection of films for the program.)

631. *News and Editorials.* On Sunday there will be six local news periods and three network; Monday through Friday, nine local and network; and Saturday, five local. Seventeen of the news periods are 30 minutes each, and 19 are 15 minutes. Two of the news and public affairs staff of 44 will be stockholders—Lawrence Pickard, director of news and public affairs, and Julian Steele, associate director of public affairs. BBI plans to affiliate with news gathering and film services like UPI and AP. It had corresponded with the New York Times News Service to obtain material from that organization; if it obtains a grant it will resume negotiations. BBI will have a Washington news correspondent who will cover matters of particular interest to New England. A specially edited Washington film summary will be included in the noon Sunday news review of the week, "Seven Days Journey." The station will broadcast editorials regularly. They will be from 2 to 5 minutes long. There will be a full-time editorial writer, responsible to the general manager. Subjects for editorials may be suggested by anyone, whether with the station or not. Decision to carry an editorial will be made by an editorial board of 5; if the board cannot agree, the subject will be referred to the general manager for possible consideration on a discussion program (see, also, par. 622, above).

632. *Discussion Programs.* These include two programs classed exclusively as discussion by BBI "As Others See It" and "Briefing Session", and 11 programs incorporating discussion. Dr. Knowles suggested the program "Here's Health," classified as one-fourth discussion, and will assist in the production of this and other BBI discussion programs.

633. *Talk Programs.* BBI will have 21 talk programs, of which seven are exclusively talk. BBI says that "in conducting community interviews on the subject of ascertainment of need, it was found that in the mind of the lay television viewer, the two stated types often become fused" (exhibit 3–E, p. 120), so it treated talks and discussion as a combined category, totaling 23 individual programs. Ten of these programs are in prime time. Members of the BBI group will be involved in some capacity or other in most of the discussions and talks programs.

634. In a supplemental analysis of its proposed programing (step I, pp. 122–128), BBI asserts that of its 139 local programs a week, 11 provide opportunities for local self-expression, totaling 12 hours and 50 minutes; 40 hours and 51 minutes will provide opportunities for the development and use of local talent; 11 hours and 6 minutes will be devoted to public affairs—plus 30 minutes for the network's "Meet the Press"—(of which four programs would be taped and repeated in the early morning as part of the proposed 24-hour operation) in which various BBI members would participate in some capacity; political reportage and discussion would be offered in two regularly scheduled programs, with early morning repeats, in addition to the usual section 315 and similar time; there would be 49 weather or market segments, totaling almost 3 hours; there will be local sports broadcasts as well

as network offerings; 2 hours and 10 minutes will provide a service to minority groups; and Sunday, from 7 to 8 each week, would be preempted for a BBI special, covering one or the other of several program categories, one of them "Television Workshop" with a first year $150,000 budget for six programs for the development of local talent, to feature established performers, with the supervision or advice of the staff of Jaffe Enterprises, Inc. BBI also claims credit for 25½ hours of "educational" broadcasting under the proposed but unadopted definition for this category deleting the requirement that it be prepared by or in behalf of educational organizations. BBI proposes to preempt 22 network programs for local productions.

635. "As Others See It" would be a Sunday evening one-half hour discussion program at 7 o'clock every 4 weeks. Participants would be foreign visitors working, studying, or teaching in the Boston area. It will deal with cultural differences, as well as with current events (app. B, p. 1). There will be a permanent host-narrator, and 16 BBI members have agreed to act as moderators and to arrange for guests.

636. "Away From It All" would be an hour program, Monday through Friday at 1 p.m., repeated at 4 p.m. Addressed to women, it is classified one-third each as entertainment, talk, and discussion. The program would deal each day with a foreign setting, or a distant or regional place of interest in this country. A woman host "will introduce travel films, book reviews, interviews with travelers and travel guides, fashion and food experts, consular representatives or other authorities. Advice will be given on customs, points of interest, tours, currency, wardrobe planning, tips on trips for family weekends and vacations, and 'away from it all' holiday suggestions. Periodically, the program will be devoted to songs of a given land with [a] national 'troubadour' providing native music and insight to the area through anecdotes and folk tales. This program is one with which Mrs. West will be concerned" (app. B–2).

637. "Boston Quiz Party," a half-hour entertainment program on Thursday at 8:30 p.m. would have a local quiz-master with suburban teams competing.

638. "Briefing Session," a half-hour Sunday discussion program at 5 p.m. would be video-taped by the news and public affairs department, using films, stills, and graphic aids. "The series also will be used to develop the station's news personalities. It will include a segment with the BBI correspondent produced in Washington, D.C., and interviews with Massachusetts, New Hampshire, or Rhode Island Senators and Congressmen. It will accommodate current affairs material concerning any sector of the world in an effort to provide additional insight on matters that interrelate broad and minority concerns" (app. B–3).

639. "Calvacade" will be a Saturday and Sunday late night program of feature films. BBI has scheduled three feature films during its proposed typical week. Messrs. Jaffe, Neuman, Gardner, and Burdick will assist the station's film buyer.

640. "Children's Religious Program," a 15-minute Sunday program at 9 a.m., will deal with religions of this and other lands.

641. "Club 5," a Thursday 30-minute program at 8:30 p.m., is divided one-third entertainment, one-sixth news, one-third discussion,

and one-sixth talk. It is a teenagers program, with a teenage host and hostess, and would be planned by a committee of high school students meeting with the station staff and other advisors. Among the duties of the host "will be the tandem presentation of a youth-oriented newscast, prepared with the assistance of the proposed news and public affairs department. Continuing features will also include: 'Front Step,' discussions of teenage manners and morals; high school teams competing in charades based upon classical quotations, historical events and the like; and an updated version of the old-fashioned spelling bee, between the suburbs. Experts and authorities will be questioned by student panels, or by the high school audience itself; guests of interest to the age group will be interviewed by the host and hostess" (exhibit 3–C, p. 15).

642. "Counsel of Elders" (two-thirds discussion, one-third talk), a Thursday very early morning and Saturday afternoon 30-minute program primarily for older people. It would present "examples of persons who have successfully met problems of advancing age, and * * * recommendations, advice and information from experts in the field" (exhibit 3–C, p. 18). Messrs. Smith, Steele, and Dr. Knowles will help to plan the program. Mr. Steele, as associate director of public affairs, will appear on it at times.

643. "Critic at Large" will be a 30-minute program on Tuesday at 9 p.m. (classified as one-half discussion and one-half talk). A host-critic will preside, with guest critics in various art fields. (At a meeting of the PAC, where, in a discussion of this program, the matter of the sense of poetry came up, a member of the PAC, Prof. I. A. Richards, emeritus, of Harvard, who, among his other books of prose and verse is author with C. K. Ogden of "The Meaning of Meaning," asked "why poetry presented on television in the past has not used the visual capabilities of television by showing poetry on the screen" (exhibit 3–C, p. 23).)

644. "Eye Opener," a 60-minute program Monday through Friday at 7 a.m., is classified one-third entertainment, one-sixth agriculture, one-sixth talk, one-sixth discussion, and one-sixth news. It will have news, weather information, a calendar of events, play and movie reviews, school reports, traffic data, sports scores and commentary, a "This Day in History" segment, U.S. Department of Agriculture "best food buys," and interviews with guests. It will use film, video stills, and graphic material.

645. "Family Journal," already referred to above, would be offered twice daily Monday through Friday, from 5:30 to 6:30 p.m. and 2:45 to 3:45 a.m. It is classified equally among entertainment, education, discussion, and talk. The program will be produced live, in a "full studio setting, studded with 'cameo' components" (exhibit 3–C, p. 26). It will cover sports, weather, talk-sketches, "practical" every-day legal information, music, news of medical and scientific developments, information on schools and colleges, jobs, and local government matters, and demonstrations of household aids. There would be a community bulletin board. "Regular segments will include participation of the police and fire departments and highway and safety services, interviews with visiting celebrities, and things for

young and old to do and see, throughout the proposed viewing area" (exhibit 3–C, p. 27). BBI members who are expert in various fields "have volunteered to assist in specialized program planning" (exhibit 3–C, p. 28).

646. "On Field Day," a 30-minute Saturday talk program at 11 a.m., high school and junior high school athletes will compete with a studio on-camera group in some indoor sport. A coach or athletic instructor will conduct the programs. Each year in late spring there will be a "giant gymkhana * * * in the gymnasium of the Browne and Nichols School, Cambridge, to which the public and the families of the participants will be invited. Full television coverage of this event will be produced by the channel 5 special events department. Winners will be awarded scholarships, grants will be made to the schools, and there will be prizes of equipment and merchandise" (exhibit 3–C, p. 29).

647. "For Women Only" will be a 45-minute program Monday through Friday at 12:15 p.m., 44 percent entertainment, 56 percent talk. BBI thinks of it as a woman's magazine of the air, with regular features on etiquette, child rearing, handling of money, and other subjects. The program will have a host and hostess, and guests at times as well as film clips. There will be book, film, and play reviews, and on occasion discussions by guests of current issues. An important part of Mrs. West's duties will be to help prepare, produce, and schedule participants for this program. BBI and Henry Jaffe Enterprises, Inc. will jointly produce the program. "For Women Only" will be available only if it can be successfully syndicated. As now planned the show would have to be syndicated to 80 or 90 stations in view of its weekly production costs of $40,000, far above BBI's budget. It would be prepared for syndication whether or not BBI gets a grant.

648. "Here's Health," previously mentioned, is a once-a-month 1-hour Wednesday program at 8 p.m., classified one-half news, one-quarter discussion, and one-quarter talk. It proposes "to draw upon the eminent position of Boston in the field of medicine," with emphasis on family health. It will have as consultants and as frequent participants, Dr. Knowles (see par. 632, above, and Dr. Sydney Gellis, PAC member.

649. "The Humanities," a half-hour program Monday through Friday at 6 p.m. and 11 a.m., is classed as educational. It is planned to develop this series in cooperation with a university in the area. Dr. Handlin was told that Harvard has regularly offered credit for television courses on WGBH–TV, Boston, when a member of its faculty was in charge, and he believes that "The Humanities" "can be developed under procedures that would permit it to qualify for course credit, with the understanding that those procedures would include consultation with a responsible member of the Harvard faculty and the Extension Division" (exhibit 3–C, p. 35). The program will be videotaped and offered for syndication to educational and commercial stations. It has been mentioned previously that Drs. Handlin and Holton have said they would help to plan the series.

650. "On Insight to Science," a half-hour Tuesday program at 7:30 p.m., classed educational, as already indicated there would be rotating panels of teacher-scientists, among whom would be Dr. Holton and Dr. Baruch. "Invitations for educational patronage will be extended to colleges and universities in the area; and guidance in the employment of films, stills, exhibits, graphic arts, and guests will be obtained from numerous audio visual experts and scientists, some of whom are members of Boston Broadcasters. Members of Boston Broadcasters who are scientists, or who are engaged in scientific research and teaching, will suggest visual aids and sources of such materials" (exhibit 3–C, p. 40).

651. "Jabberwocky" would be a pre-school-children's entertainment program at 7 a.m., for 120 minutes on Sunday and 90 minutes on Saturday. For some unexplained reason the host will be the "Jabberwocky" of the program title (according to BBI (exhibit 3–C, p. 42), "inspired by the famous poem by Lewis Carroll," which, it appears, no one on BBI managed to consult, let alone see if the Sir John Tenniel illustrations included a prototype suitable for little children; the poem, it will be recalled, warns "Beware the Jabberwock, my son! The jaws that bite, the claws that catch! * * * The Jabberwock with eyes of flame," hardly a pleasant description of a host for tots, though it is assumed that only the name will recall the character). Other Lewis Carroll characters will assist Mr. Jabberwocky. There will be films, puppets, and live actors. Thirteen school superintendents and school heads, four college presidents, and 10 librarians, have "indicated their willingness to participate. It is planned to rely upon these persons to recommend story materials, to evaluate the effectiveness of the program in serving the intended age groups, and so on" (exhibit 3–C, p. 43).

652. "New England Almanac," 15 minutes Monday through Saturday at 6:30 a.m., is classified one-third news and two-thirds agricultural. There would be market reports, agricultural news, and information on weather, gardening, and transportation conditions.

653. "One World" will be a 60-minute religious program, every 4 weeks on Sunday at 7 p.m. BBI "will invite representatives of various religious faiths to participate in discussions of * * * subject, illustrated with appropriate art, music, and drama" (exhibit 3–C, p. 45), like the meaning of suffering, the meaning of individual freedom, and what is love? Discussion will cut across sectarian lines.

654. "Open the Door," 30 minutes Monday through Friday, is classified as one-half entertainment, one-third educational, and one-sixth talk. It is aimed at children up to 12 years old, and will be broadcast with a children's studio audience. It will use documentary films, scientific models, collections of rare art, animals and books, available from universities, and libraries. Staff cameramen will shoot supplemental footage.

655. "The Problem" will be a 60-minute Sunday program, every 8 weeks, at 7 p.m., classified two-thirds talk and one-third discussion. It would examine major community problems "in association with authorities in various fields who are available in the many institutions of research and education in the * * * Boston area" (exhibit 3–C,

p. 53). It would be prerecorded. BBI members who have agreed to participate in the selection of subjects, membership on panels, and obtaining guests are Mr. Atkinson, Judge Brown, Dr. Knowles, Mr. Smith, and Mr. Steele. Messrs. Jaffe, Wood and Neuman will assist the local producers on some programs.

656. "Rise and Shine" will be a 15-minute physical exercise program under a physical therapist, Monday through Friday at 6:45 a.m., classified as talk.

657. "Screening Room" is a 90-minute film program, Tuesday through Saturday at 1:15 a.m., classified as two-thirds entertainment, one-ninth education, one-ninth discussion, and one-ninth talk. It is a trial program which will carry experimental films, public service and educational films, pilot programs, previews, and occasional pre-taped student and apprentice productions. There will be television and theater-drama classes. It is estimated that two-thirds of the program time would be recorded, with the balance equally divided among educational material, discussion and talk on the filmed or taped material. Mr. Gardner will suggest, evaluate, and obtain films, and advise on scheduling. Messrs. Jaffe, Wood, and Neuman will also assist in preparation of film programs.

658. "Seven Days Journey" is a 30-minute Sunday noon news program, reviewing the previous week's news. It will also include editorials or excerpts from the regional and local press, and will use film, stills, tape, graphic materials, and special effects. A specially prepared report by the station's Washington correspondent will be a feature.

659. "Sound Off!" is a 30-minute Sunday program at 1 p.m., classified as two-thirds discussion and one-third talk. BBI will form a channel 5 critics club under the chairmanship of Dean Wiebe. A club selection committee will invite persons to appear on programs. Each week a panel of club members will meet on the air with the general manager or other members of the station's staff or the board of directors, in an unrehearsed discussion and criticism of the preceding week's programs, with possible suggestions for improvement. Though the program is unrehearsed, "potential participants will be carefully screened to determine in advance that [they] will have something to contribute * * *. We believe that this will insure meaningful and provocative program material" (exhibit 3–C, p. 67).

660. "Spice of Life," a 30-minute Sunday news program at 11:30 a.m., is designed to "give a fillip to the total channel 5 news service with transient items from the march of events of the preceding week [which, on the authority of this prose style, should be Cliché Week], ranging from the humorous and bizarre to the serious statistic" (exhibit 3–C, p. 69). BBI says that the program "will accent the droll, the touching, and the ironic" (exhibit 3–C, p. 69), but it is an act of mercy not to repeat the fanciful illustrations in the exhibit. There will be a host, who will be selected for his "pungent personality and identity with the New England region" (exhibit 3–C, p. 69).

661. "Story Circle" will be a 30-minute Saturday program at 4:30 p.m., classified as Educational, in which children from 4 to 8 "will gather in the television studio to hear complete short works or portions of longer works read by experienced readers or players currently

in Boston * * * Cooperation of libraries in the station's service area has been assured" (exhibit 3–C, p. 70). The program will be recorded and will be available to schools and libraries.

662. "The Television Workshop," a 60-minute Sunday program at 7 p.m. every 8 weeks, is classified as entertainment. Its stated aim is to "provide a resource for professional experimentation with new television techniques and concepts; and to give outstanding artistic talent within the proposed signal area a prime time showcase, in their own community, supported by professional direction and production aids" (exhibit 3–C, p. 72). According to BBI, off-Broadway (but perhaps more properly off off-Broadway, since off-Broadway has now moved closer in concept to the commercial theatre) type productions by local semiprofessional and college drama groups would be offered; and it was previously noted that Miss Caldwell, of the Boston Opera Group, Inc., has expressed her interest in the production of operas. Dr. Beranek and Mr. Gardner will assist in the production of the series, which will also draw upon the professional knowledge and experience of Messrs. Jaffe, Wood, and Neuman.

663. "This Hallowed Ground/Progress Report" are two separate but related 60-minute Sunday programs at 7 p.m., every 4 weeks, classified as two-thirds entertainment and one-third talk. They are BBI Specials. The programs will contrast the old "This Hallowed Ground," with the new "Progress Report," with a topical link—for instance, "Horace Mann and The American School" would be coupled with a "Survey of Modern New England Schools." There would be taping on location, stills and graphic arts, and guests like historians, architects, and city planners; dramatized presentations would be used when appropriate. Several BBI members, including Dr. Handlin, Mr. Poorvu, Judge Brown, and Mr. Pertzoff have agreed to work with the producers, writers, and researchers on these programs. Mr. Steele, the station's associate director of public affairs, will be executive producer.

664. "Transitions" is a 60-minute Friday program at 8:30 p.m., classified equally between discussion and talk. It will deal with community problems like water and air pollution, and will use film, videotape, graphic arts, and guests, with on-the-spot live coverage at times, as for a town meeting. A considerable part of Mr. Steele's time as associate director of public affairs will be taken up by "Transitions." Other experienced BBI members will help produce the program.

665. "Vistas," 15 minutes Saturday and Sunday at 6:45, classified as entertainment, will feature filmed visits to New England beauty spots. The films will be offered free to schools, service clubs, civic groups, tourist groups, chambers of commerce, and libraries. BBI will promote the program intensively. Several BBI members will help on the program by suggesting sites and filming techniques.

666. "What's New in Agriculture" will be a 30-minute Saturday program at 6 a.m. One of the 12 Massachusetts county agents will be the host. He will show Department of Agriculture films with commentary for farmers and gardeners.

667. "Where Your Money Goes," 30 minutes, Monday at 8 p.m. and Saturday at 5 a.m., is classified as two-thirds discussion and one-third talk. There will be discussion of taxes, the stock market, and the cost

of living, among other subjects involving the economy. The program will have local businessmen and government officials as guests. As stated above, Professor Bursk will help in preparing subject outlines, scripts, and research material, and will often appear on the program. Continuing contributions would also be made by Mr. Goodrich and Mr. Marran.

668. "Words and Music," will be a 30-minute Sunday entertainment program at 7 p.m., every 4 weeks. It will offer music "from the solo folk singer through the string quartet to the jazz group" (exhibit 3–C, p. 84). Andre L. Speyer, a symphony musician, music teacher and commentator, who is a professional broadcaster, has agreed to be the host. The program will follow "As Others See It," every fourth week, as a BBI special.

669. "World of Wonders," a 30-minute Saturday entertainment program at 8:30 a.m., is a film show for grade-school children. Mr. Gardner has "agreed to be available (as host) for at least (some) of the programs" (exhibit 3–C, p. 88); a similar personality will be sought for other programs. Messrs. Gardner and Neuman will advise on film selection.

670. In planning its proposed typical week, BBI followed the CBS fall 1963 television network schedule announced in March 1963. It proposed to preempt a considerable number of network programs in favor of local originations. BBI did not check with CBS about the number of network programs which must be carried to maintain an affiliation, nor about CBS' other affiliation criteria; and it did not compare the percentage of network clearances it proposes with the usual clearances of CBS-affiliated stations. It felt sure of a CBS affiliation, however, because it would be one of three Boston VHF stations, and because, in its opinion, CBS would be attracted by its surrounding local programs. BBI did not inquire about network programs in its various studies and surveys. The PAC was not consulted about the programs to be preempted. When Professor Handlin was asked why in its questionnaire BBI did not give the respondent a choice between the proposed local program and the preempted network program, he said that "the price of the sacrifice" would not be a factor in this answer. It might be in the answer to a different question which we didn't ask but which might have a different kind of value (tr. 7511).

671. *Proposed Integration of Ownership With Management.* With the exception of the clerk all BBI officers are stockholders. (Mr. Burdick's and Mr. Pickard's stock, it has been noted, would be issued on grant.) The directors will meet once a month.

672. As president, Dr. Beranek (4.45 percent) proposes to give at least 10 hours a week to BBI, 2 hours a day on a scheduled basis at the station itself. (He currently spends 1 month a year on a trip to the German office of his company. He also travels extensively in this country making speeches and meeting clients. Should BBI be successful he will continue to travel for Bolt Beranek and take his annual trip to Germany.) He will resign his lectureship at MIT, and has arranged with his firm for the necessary time. "His principal functions will include interpreting the board's policies for the administrative staff, acting as spokesman for the corporation in its relationship with

the public and with other organizations which have an interest in the company's broadcasting facilities, maintaining liaison between the stockholders and the directors and the administrative staff, and resolving any jurisdictional or other problems arising in the operation of the station and which may be referred to him by the general manager or executive vice president. He will also preside at meetings of the stockholders" (exhibit 3–H, p. 3). Dr. Beranek will be a member of the editorial committee. He will participate in the production or formulation (by the latter is apparently meant the suggestion of topics or format) of several regularly scheduled programs.

673. Judge Brown (5.12 percent), "chairman of the board, will preside at meetings of the board of directors and in the absence of the president preside at the stockholders' meetings. He will assist the president in liaison with directors and stockholders. He will also assist in liaison with the State and local governments and citizens' groups. In the president's absence, he will be available as a substitute for the president to fulfill any functions of the president which the latter may be unable to perform. He will also perform such other duties as may be assigned to him by the directors. Including his duties as outlined in connection with specific programs, he will regularly devote at least 8 hours a week to the work of the corporation" (exhibit 3–H, p. 3). He testified that he plans "to serve approximately 8 to 10 or 12 hours a week, depending upon the need of the station" (tr. 8005). A reduction in his community activities—he had not run for reelection to the Brookline Board of Selectmen—would allow him time for the station. Among other functions, Judge Brown would substitute, when necessary, for Dr. Beranek in "keeping in close touch with the art, theater, drama, (and) opera world" (tr. 8007). He will help prepare and appear on several proposed programs—"Family Journal," "The Problem," "Transitions," "This Hallowed Ground," and as one of the rotating moderators of "As Others See It." For instance, a portion of "Family Journal," to be presented perhaps once or twice a week, will deal with law for the layman; his participation would "involve formulating the ideas for the program, clearing them with the necessary authorities, such as the Bar Association, perhaps discussing them with some member of the judiciary, whatever the appropriate place to turn would be for clearing the ideas, and then after formulating the ideas and assisting in their formulation to assist in securing lawyers or judges or other persons to fill the shoes of the persons who will present the programs" (tr. 8009). Over a 35-year period Judge Brown has headed a number of organizations, has sat on the bench, and has conducted panel discussions. He has had some limited experience in television discussion programs, and has "also appeared from time to time on political broadcasts for candidates for public office" (tr. 8013). Judge Brown will receive an $8,000 annual salary as chairman of the board.

674. Mr. David, executive vice president (6.31 percent), will be the full-time administrative officer and general counsel of BBI. In association with Washington legal counsel "he will be responsible for advising the corporation on FCC policies and regulations and prepare applications and reports for submission to the FCC. He will be avail-

able to render legal advice and services to directors, officers and staff and will also be responsible for preparation of all contracts and supervision of all contractual relationships. In continuing consultation with the general manager with reference to network matters, he will also be the liaison with the network with which the station may be affiliated. In cooperation with the general manager, Mr. David will make recommendations to the board with reference to stock participation by key employees. He will also work closely with the general manager in the area of labor and community relations and in directing the company's continuing survey of program needs and resources in its service area" (exhibit 3–H, p. 2). He will be the station's contact man with broadcasters associations and organizations like ASCAP, BMI, and SESAC. He will be in charge of program syndication and exchange. If BBI's application is granted, Mr. David will leave private law practice.

675. Mr. Burdick (5.91 percent on grant) as general manager will be in charge of the day-to-day operation of the station. "Subject to the policies of the board of directors, he will be in direct charge of all operational functions and personnel, including administration, program production and publicity, technical production, and sales. Under him, department heads will supervise the work of each department. Mr. Burdick will also have an executive assistant (Mrs. West, see below)" (exhibit 3–H, p. 1). He will also be a member of the editorial committee. Mr. Burdick was elected a vice president, after the BBI application was filed, on March 28, 1964. The application was not amended to reflect his election, but it was disclosed during Mr. David's direct examination.

676. Mr. David, the executive vice president, will be at the station except when traveling on official business. He will be the president's right-hand man. He will meet frequently with the general manager, who can discuss ideas or problems with him; if there is a disagreement they will go to the president for a decision. The executive vice president's position, said Dr. Beranek, is regarded as a staff position, with presidential functions delegated to it as the president sees fit, while the general manager is considered to occupy a line position. Mr. Poorvu testified that he had told Dr. Baruch "that considering the amount of local programing we were projecting and considering the community contacts that we wanted to have * * * it would be quite a job for one person as general manager to be able to do all that we expected. I told him that I felt that if we could create a position such as executive vice president that would be able to take many of these functions that did not relate to the actual local operations * * * it would be helpful. It would enable Richard Burdick to * * * spend much more of his time in actual programing and I felt that this was very important considering that our president was only going to be working part time" (tr. 10480–81). Mr. Poorvu did not think that their (Mr. David's and Mr. Burdick's) functions particularly overlap, but it is anticipated that they will work together in certain areas (tr. 10122).

677. On March 23, 1963, the BBI board of directors adopted a resolution creating the office of executive vice president and elected Mr. David to the position. The resolution provided that the executive

vice president was to be responsible for the day-to-day operations of the corporation (BBI, in step III, stresses the last word as opposed to station, in which, it contends. Mr. Burdick would have primacy in the day-to-day operations). On April 4, 1963, the Board decided that the clerk, treasurer, general manager. and director of news and public affairs would report to the executive vice president, who should coordinate their efforts and make frequent reports to the president, who in turn would refer such matters to the board he thought appropriate. After Mr. Burdick executed his employment contract with BBI the board adopted a resolution making Mr. David responsible for network relations. Charles River and WHDH contend that the record reveals considerable confusion, both in the discrepant testimony of the BBI principals as to their interpretation of the respective roles of Mr. David and Mr. Burdick and in the adumbration of their prospective responsibilities. BBI, in opposition, denies any contradiction in the testimony of the principals or the job descriptions, contending, as above indicated, that Charles River (against whom its strictures are particularly directed) has lost sight of the distinction, already indicated above as foremost in BBI's mind, between corporate and station operations (including programing); and that it is clear that Mr. David will supervise the former and Mr. Burdick the latter. The Hearing Examiner has read the testimony cited by the parties and has concluded that the most that need be made of the matter is the following. The record is by no means as clear as BBI maintains (or as might be inferred from Mr. Poorvu's testimony, above) whether in particular areas Mr. David is Mr. Burdick's superior or vice versa, or whether they are equals, and if so whether each is individually responsible for the same or some of the same functions like network relationships, for example.

678. But these testimonial and planning disparities, no matter how large they may loom to parties hoping to score points in a comparative case, or how vigorously they are advanced by them, portend little in actual operation. Whatever paper conflicts in authority exist will no doubt be resolved in practice, and it may reasonably be predicted that the alarming power struggles that Charles River and WHDH seem to envisage will not occur. Whether, however, as Charles River charges, and as BBI denies in view of its large percentage of local programing, the diffusion of executive functions in a single station among the chairman of the board, president, executive vice president, general manager and vice president, and possibly the executive assistant to the general manager (see below in paragraph on Mrs. West) is a device to obtain undue credit for integration, may be considered below.

679. Lawrence Pickard (2.36 percent on grant) will be director of news and public affairs, a position similar to the one he has held with WBZ–TV, Boston. Mrs. Eunice S. West (1.53 percent) will be the executive assistant to the general manager. Though she will not appear on women's programs, she "would expect to come up with ideas, do research, find women who are interesting who have interesting jobs or careers or hobbies or do tremendous volunteer work" (tr. 9840). (Mr. Jaffe, however, did not know what Mrs. West could do, and was not even sure whether he had ever met her.) Mrs. West will also "assist the

(general) manager with special responsibility for community relations," visiting groups and arranging on-the-air appearances. Mrs. West testified that she would expect to act for Mr. Burdick in his absence, giving instructions to the program manager, the director of news and public affairs, the chief engineer, and the personnel manager if Mr. Burdick had not done so before leaving. She said: "I would carry out any responsibility that would need to be done that he would be doing" (tr. 9835). But from Mr. Poorvu's testimony it appears that Mrs. West had too grandiose a conception of her authority. He agreed that she would "primarily represent (the general manager) in relationship to outside groups and not with respect to representing him in connection with people who are on the staff of the station" (tr. 10120). Julian D. Steele (.86 percent) will be associate director of public affairs. He will also be executive producer of "This Hallowed Ground/ Progress Report," and will contribute to other programs. Mr. Steele has no record of program production. Mr. Jaffe testified that an experienced executive producer was needed for "This Hallowed Ground," that he had read the exhibits and probably learned then that Mr. Steele would be executive producer but had forgotten it by the time he testified, and that he himself had no knowledge of his qualifications and had not considered his appointment, though possibly it had been discussed with Messrs. Wood and Neuman. Martin B. Hoffman (3.06 percent) will be in charge of product and credit clearance. He has no experience in product clearance. All mentioned in this paragraph would be full-time employees.

680. Messrs. Jaffe (2.14 percent), Wood (.71 percent), and Neuman (.71 percent) would be consultants to the station, advising on programs and production, and will also provide the production services for the programs to be delivered by Henry Jaffe Enterprises, Inc. As consultants they will act as a team, assisted by Edward Cosgrove, an employee in the Jaffe organization "involved in studio equipment matters" (tr. 8725). Mr. Jaffe would spend at least 2 hours a week on BBI, but is prepared to spend all the time necessary; he believes that it will be much more than the 2-hour minimum. He now divides his time between Los Angeles and New York, and will arrange his flight schedule between Los Angeles, New York, and Boston to accommodate BBI. Mr. Wood and Mr. Neuman would spend at least 5 hours a week on BBI.

681. Mr. Gardner (3.34 percent) will spend 15 hours a week on the station, partly in his own office in Cambridge and partly at the station itself. Since his BBI work "will simply be an extension of the work that I carry on daily routinely" he foresaw no difficulty in finding the time (tr. 8827). He now spends considerable time traveling, but hoped that following an initial curtailment of traveling "a modus vivendi could be worked out between myself and BBI to permit me to go on with my professional life" (tr. 8843). He will be the producer and host of the weekly "Realities" program, host or co-host of "World of Wonders," and consultant to "Screening Room," "Vistas," "TV Workshop," and "Cavalcade."

682. Dr. Baruch (4.45 percent) will spend an average of 6 hours a week on the station. He will be one of four rotating instructors on

"Insight to Science," a science consultant to "Family Journal," and will assist in the preparation and presentation of the BBI special, "As Others See It." He will also advise on and supervise the continuing audience research.

683. Professor Bursk (1.11 percent) will spend 15 hours a week in programing, particularly on "Where Your Money Goes," for which he will prepare scripts, outlines, and research material, and on which he will make frequent appearances.

684. Professor Handlin (2.23 percent) will also spend 15 hours a week on the station. (His present normal workweek is at least 70 hours.) He is chairman of the program advisory committee and of the editorial board. He will help in the research and writing for "This Hallowed Ground/Progress Report," and will consult weekly with station management and program executives and producers, "in planning and implementation of scheduled and 'special' programs" (exhibit 3–H, p. 5). To make time for BBI, Dr. Handlin would probably give up lecturing outside Harvard, very likely would no longer act as a publishers' consultant, and would not accept a Federal reappointment to the Board of Foreign Scholarships; and he could also curtail his writing and research.

685. Professor Holton (.45 percent) will spend 4 hours a week on the station, in the preparation of "Insight to Science," once a month, as one of its rotating instructors, and as science consultant to the producers of "Family Journal." Dr. Knowles (3.34 percent) will give the station 2 hours a week as consultant for "Here's Health," among other matters. He would drop some of his present writing to work for the station. Mr. Smith (.45 percent), 2 hours a week, will help plan some programs. Mr. Marron (5.56 percent), 2 hours a week, will help in the preparation and production of "Where Your Money Goes," and arrange for guests on "Family Journal."

686. Mr. Poorvu (6.67 percent), as treasurer, will be chief fiscal officer. He will supervise the corporation's accounting and fiscal controls, and will be in charge of budgets, allocation of funds, and tax decisions. He will pass on all major expenditures, submitting to the board any proposals he thinks necessary. It is expected that he will spend at least 8 hours a week as treasurer.

687. Under a formally adopted stock purchase plan for key personnel, stock equal to 33⅓ percent of the total number of shares issued to investors, or the equivalent of 25 percent of the total capital stock of the company, has been reserved for key employees, as selected from time to time by the directors. For 10 years after issue the corporation will have the option of repurchasing the stock at book value if the employee leaves BBI, but at the end of each year of the sixth through the 10th years of continuous service 20 percent of the employee's stock is to be freed from the option. Of the 25 percent of the reserved company stock, 3 percent has been issued to Messrs. Jaffe, Neuman and Wood in a special transaction, and 5 percent and 2 percent have been set aside for Messrs. Burdick and Pickard, respectively. Fifteen percent of the corporation's stock therefore is still available for key employees.

688. BBI proposed no auxiliary power generators for either transmitter or studio operation, and no alternative transmitter, microwave or other equipment to insure operation if power or equipment fails.

CONCLUSIONS

689. In this case transcript and exhibit volumes, if piled up, would reach a mark higher than the Inca Atahualpa's when he indicated to Pizarro the amount of gold to be delivered for his ransom. Unfortunately, not all the contents of these volumes are of metaphorical gold. But this less noble admixture is inevitable in a long hearing in which an incumbent licensee, like the priests of Diana of the Woods at Aricia (Frazer, *The Golden Bough*, ch. 1), was shielding itself from lethal attack by aspirants to its place. ("In this sacred grove there grew a certain tree round which at any time of the day, and probably far into the night, a grim figure might be seen to prowl. In his hand he carried a drawn sword, and he kept peering warily about him as if at every instant he expected to be set upon by an enemy * * *.")

690. The only issues on which the original channel 5 and the renewal proceedings were consolidated for hearing were the two added, in response to the court's remand, because of the death of Mr. Choate. As contemplated in the Commission's memorandum opinion and order stating them, they will be decided first. Next to be considered will be the noncomparative issues, and lastly the comparative showing of the applicants. From paragraph 691 to paragraph 716, the conclusions below are based with modifications and additions, on the Broadcast Bureau's recommendations in steps II and III, except for paragraph 700 to paragraph 711 on transfer of control.

691. *Remand issue relating to changes made by WHDH, Inc. as a result of Robert B. Choate's death* (paragraph 13, above). Though interested in finances, and in programing to the point of discussing it with Mr. McGrath, Mr. Choate was primarily concerned with the station's physical assets—buildings, property, equipment, and engineering progress. On the basis of the stipulation quoted in paragraph 174, above, it is concluded that no material changes have taken place since November 1, 1963 (because of his illness, Mr. Choate took no part in WHDH affairs from then until his death) in maintenance and improvement of technical facilities, operating policies, and programing operation of WHDH–TV; and that the operation of WHDH before November 1, 1963, is representative of its operation since that time. The boards of directors of WHDH and Herald-Traveler adopted resolutions noting that there had been no changes in policies governing the operation of WHDH because of Mr. Choate's death, and that they did not intend to make any changes. Although five of the Herald-Traveler directors do not seem to have specifically known the policies which were to remain unaltered, it must be concluded, in the absence of evidence to the contrary, that no material changes have been made by WHDH, Inc. as a result of Mr. Choate's death.

692. *Remand issue relating to effect of Mr. Choate's death on Commission's Decision of September 25, 1962* (paragraph 13, above). This issue calls for a reassessment of the Commission's September 25, 1962,

decision "in light of the evidence adduced pursuant to the * * * issue [considered in the preceding paragraph] and the absence of Mr. Choate." Three alternative conclusions are possible: (*a*) Reaffirmance of the short-term grant to WHDH; (*b*) grant of the application of Greater Boston I, the only other applicant in the original proceeding; and (*c*) a determination that no grant should be made on the earlier record, the comparative phases of which were closed more than 10 years ago.

693. The circumstances here are somewhat different from those in other cases in which a dominant figure in a competing applicant died after the record was closed. Mr. Choate died in December 1963. Construction of WHDH–TV had of course been long completed, as the station has been on the air since 1957; and before his death WHDH's renewal application following grant of a 4-month license had already been designated for comparative hearing with three other applications for channel 5. It has twice been noted above that Greater Boston II, one the applicants, was in reconstituted form so nearly identical with Greater Boston I, the other remaining applicant in the original proceeding, that the Commission waived the provisions of rule 1.309 (now 1.519) prohibiting repetitious applications (1 R.R. 2d 468, 743). For comparative consideration, therefore, are not only the two applicants from the original proceeding (counting Greater Boston II as the substantial equivalent of Greater Boston I), with an up-to-date record, but two new applicants as well. In this situation, to require a reevaluation of the original record made by Greater Boston I and WHDH (with Mr. Choate dead, and forgetting, since it is not expressly a factor in the remand, that Mr. Henry is no longer with Greater Boston I), would not advance the interests of either applicant. What is more important, it would not serve the overriding public interest in the ending of this seemingly interminable proceeding. There is little chance that the court of appeals would sustain a full-term grant to Greater Boston I or WHDH on a stale record. See *WORZ, Inc.* v. *FCC*, 345 F. 2d 85, 4 R.R. 2d 2015. Nothing less than a full-term grant would be meaningful to Greater Boston I. As between the remaining alternatives—affirming the short-term grant of September 25, 1962, to WHDH, or that no grant should follow on the original record—two considerations must be borne in mind: (*a*) It is impossible to make the past vanish and treat WHDH as though it had never operated a TV station, even if it were to be considered an applicant for initial license. (*b*) Whatever advantage WHDH might enjoy in being an applicant for renewal rather than original license might be diminished because part of its record had been compiled under the gun, or more fittingly, under the spur; for (without reference to the imperiling of its license by the appeal) WHDH has known, since its short-term grant in 1962, of the inevitable filing of competing applications. (Only if it should finally be decided what has never been held—that Mr. Choate's ex parte approaches were effectual in negating a proper adjudication of WHDH's claims and that its grant was void ab initio—could WHDH's TV record be obliterated.) Cf. *South Florida Television Corp.* v. *FCC*, 349 F. 2d 971, 5 R.R. 2d 2092. And also Cf. *Community Broadcasting Corp.* v. *FCC*, USCA, DC., June 22, 1966, 7 R.R. 2d 2085, where broadcast

experience rather than record was recognized. It is therefore concluded that modification of the Commission's decision of September 25, 1962, would not serve the public interest at the present stage of this protracted proceeding. The merits of the various theories bearing on the comparative demerit, if any, to be assessed against WHDH because of Mr. Choate's ex parte contacts, and the effect of Mr. Choate's death, can be argued effectively and with greater overall expedition (if that is not a humorous word in this case) in the renewal proceeding.

694. The Hearing Examiner does not believe that he is authorized to adopt WHDH's suggestion (proposed conclusions, remand issue) that Greater Boston I is estopped (or precluded) "in dockets Nos. 8739 and 11070 from contending that the preferences awarded WHDH by virtue of Mr. Choate's proposed participation in staffing, facility construction and programing have not been earned by WHDH by reason of the fact that all of these proposals had been executed prior to Mr. Choate's death." This asserted estoppel is based on the proposal of Greater Boston II (which WHDH considers in substance the same applicant as Greater Boston I) "to take over the WHDH physical facilities and operating staff [with the exception of Mr. McGrath] and to program its proposed station in [practically] the same manner as WHDH programs WHDH–TV * * *." But Greater Boston I and WHDH are still opponents in the Court appeal, and it would be impertinent, if nothing more, for the hearing examiner to rule that Greater Boston I is estopped—that is, prevented from even advancing its contentions—and possibly prejudice its standing in the appeal.

695. *Issue relating to legal qualifications of stockholders, officers, and directors of the parent Herald-Traveler Corp., as required by Section II of Form 301* (paragraph 11, above). As an applicant for license renewal, WHDH filed form 303 instead of the 301 filed by the other applicants. As there had been changes in the composition of the Herald-Traveler Corp. since the original TV construction permit grant in April 1957, an issue was added to secure from WHDH information on the stockholders, officers, and directors of the Herald-Traveler called for by section II, form 301 and bearing on a determination of the legal qualifications of WHDH, Inc. WHDH furnished this information as part of its direct case. Cross-examination developed, to the extent shown in the findings of fact, that in some instances a Herald-Traveler director had failed to list certain other business interests or the dates on which they began. There is no evidence that these omissions were deliberate or for the purpose of deceiving the Commission. Indeed, the very nature of the data omitted makes clear the absence of a motive for concealment. There is nothing in the material supplied by WHDH in its direct case, or obtained from witnesses through cross-examination, which would adversely affect its legal qualifications, or require modification of the Commission's determination (1 R.R. 2d 468, 472) that WHDH is legally qualified. It is concluded that within the context of this issue WHDH is legally qualified.

696. *Issue relating to Rule 73.636.* Rule 73.636 reads in part:

> Multiple ownership.—(*a*) No license for a television broadcast station shall be granted to any party (including all parties under common control), if:
>
> * * * * * * *

(2) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station, if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity * * * The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience, or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven television broadcast stations, no more than five of which may be in the VHF band.

* * * * * * *

NOTE 2: In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

697. On the present record, and in light of the discussion in the findings of fact, there is no basis for holding that any of the officers or directors of the Herald-Traveler Corp. has a 1 percent or other reportable interest in any other broadcast licensee. At the original closing of the hearing record none of the 1-percent-or-greater stockholders of Herald-Traveler held a 1 percent or other reportable interest in any other broadcast licensee. But after closing Lill & Co., a nominee for the First National Bank of Jersey City, acquired a reportable interest in the stock of Herald-Traveler; WHDH duly reported this acquisition to the Commission through ownership reports. The beneficial owner of the stock is Television-Electronics Fund, Inc., Chicago. Commission records reflect that Lill & Co. is the record holder for the fund of a reportable interest in five other Commission licensees, four of whom are multiple owners of VHF TV stations, with a combined total of 20 TV stations. The Lill & Co. holdings are therefore in apparent violation of rule 73.636. There is no evidence, however, that Lill & Co. has attempted to influence Herald-Traveler policies; and, in fact, Mr. Talmadge's affidavit establishes that it signed a proxy in favor of management. That the Commission is aware of the problems arising from investment by mutual funds and the like in the stock of publicly-traded licensees is apparent from its *Notice of Inquiry and Notice of Proposed Rule Making*, docket No. 15627, 1 R.R. (part II), p. 53: 1vii. But in accordance with the Commission's ruling in *Baltimore Broadcasting Co.*, 1 R.R. 2d 798, it is concluded that (at least in the absence of a report and order by the Commission on the proposed rulemaking) WHDH is not disqualified under rule 73.636.

698. *Citizenship issue.* All officers and directors of WHDH, Inc., and of the Herald-Traveler Corp., are U.S. citizens. The Herald-Traveler owns all the stock of WHDH, Inc.

699. Mr. Talmadge's testimony that 489,579 Herald-Traveler shares, or 92.6 percent of the outstanding stock as of March 31, 1964, was held by U.S. citizens, has not been successfully challenged. WHDH is therefore comfortably beyond the proscription of sec. 310(a)(5) of the Communications Act of 1934, as amended, which prohibits a grant to, or holding of a station license by:

Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the capital stock is owned of

record or voted after June 1, 1935, by aliens, their representative, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

WHDH has established that a grant of its application would be consistent with the provisions of section 310(a)(5) of the Communications Act of 1934, as amended.

700. *Transfer of control issues.* Section 310(b) of the Communications Act reads in part:

No * * * station license * * * shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application for the permit or license in question * * *.

The Commission's rules provide for advance authorization, as contemplated by sec. 310(b).

701. It is clear from the evidence that the ownership of Herald-Traveler has changed not once, but many times, over the years. This is exemplified by the finding (par. 120, above) that as of October 31, 1964, there were 1,470 stockholders; that 12 of them held 50.9 percent of the outstanding stock; and that none of the 12 held a reportable interest as recently as January 15, 1960. Herald-Traveler stock is traded over the counter. Except for certain transactions fully explored in the record, and which do not involve acquisition or relinquishment of affirmative or negative control by a group in privity (see note to rule 1.615(c)(4)), it cannot be concluded that the rest of the hundreds of stock transactions were by, or on behalf of, persons or groups seeking control of the Herald-Traveler. Indeed, the tabulation by WHDH which shows the number of shares voted by proxy each year (par. 117, above) indicates that most of the stockholders involved were concerned with their investment rather than with corporate control.

702. By definition ownership and therefore de jure control rests with the stockholders. In adding the transfer of control issues, the Review Board said (3 R.R. 2d at 582–3): "As the instructions to FCC Form 323 point out, a transfer of control is effectuated at such time as 50 percent or more of the stock passes out of the hands of stockholders who held stock at the time the original authorization was issued. The fact that de jure control in these circumstances might not amount to actual control of the corporate licensee because of a failure to exercise de facto control does not mean its existence can be ignored. See *Pacifica Foundation*, FCC 64–43, 1 R.R. 2d 747 (1964)."

703. The board also said (3 R.R. 2d at 582): "The term 'control,' as used in section 310(b) and in the Commission's rules, may embrace de facto as well as de jure control; however, there is no exact formula by which the Commission is bound to determine whether 'control' of a corporate licensee has been transferred or acquired. *Press-Union Publishing Co.*, 7 R.R. 83 (1951); *Western Gateway Broadcasting Corp.* (*WSNY*), 6 R.R. 1325 (1951)." The Commission observed,

many years ago, in a pronouncement that has never been overturned, in *Powel Crosley, Jr.*, 11 FCC 3, 20; 3 R.R. 6, 23: "Nothing in the act restricts 'control' to a majority of stock or to any definite percentage of stock. We believe that a realistic definition of this term includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." See, also, Berle and Means, "The Modern Corporation and Private Property" (the MacMillan Co.), book I, ch. V.

704. Besides the transfers represented by the change in the ownership of a majority of the stock, mentioned in par. 701, above, one may therefore look to a passage of management power to determine whether there was a change of control. If the Herald-Traveler board of directors were considered a center of de facto, or actual, control (as ordinarily would be entirely reasonable), then changes in the composition of the board since September 29, 1954 (when, as noted in the findings of fact, the Commission last approved a transfer of control application) would have resulted in a transfer of de facto control. Of the seven members of the board on September 29, 1954, four were no longer on the board at Mr. Choate's death on December 21, 1963; Mr. Sidney W. Winslow, Jr. died and Mr. Cox and Mr. Gilbert retired, and their places were taken by others. The record in this case, however, supports the conclusion that actual control of the Herald-Traveler corporation, particularly as to WHDH, was exercised by Mr. Choate (who continued the strong executive domination of Sidney W. Winslow, Jr.) until his last illness, and afterwards by George Akerson. The Herald-Traveler board has never given any instructions as to the voting of WHDH stock or the election of directors. The board does not discuss station policies, practices, or programing. Except for submitting proposed capital outlays over $100,000 to the Herald-Traveler board for its consideration, Mr. Choate was, and Mr. Akerson is, empowered to take any action thought necessary for the operation of the television station. That control in its practical aspects rests in the president of Herald-Traveler is illustrated by two other facts of record. When Mr. Choate was ill, Mr. Akerson performed his duties without further direction from the board; and when the board passed its resolution that there had not been, and would not be, any change in station policies, at least five members of the board did not know what policies they were leaving unchanged.

705. So much for the facts and some applicable law. To fasten liability upon WHDH, however, for not obtaining prior Commission approval is something else again. In its step III proposed conclusions the Broadcast Bureau writes that it "has concluded that WHDH, Inc., had an obligation on more than one occasion to file an application for Commission consent to transfer of control. Transfer of de jure control occurred when 50 percent of the stock of Herald-Traveler passed out of the hands of stockholders who held stock as of the time of the Commission's approval of the transfer of control application eliminating Fidelity Broadcasting Co. as a holding company, September 29, 1954. Precisely when this occurred, or how many times transfer of de jure control occurred through public trading of the Herald-Traveler stock,

cannot be determined on the basis of the present record. However, such precision is not required in determining whether or not there has been compliance with section 310(b) of the Communications Act." See also Charles River step III proposed conclusions, pp. 15 ff. The Hearing Examiner does not agree with this interpretation of WHDH's burden; he adopts, instead, the reasoning of WHDH in its step IV brief.

706. In summary—WHDH contends that there is no actionable transfer of control of a publicly held corporation, even though 50 percent or more of the stock has changed hands since the last Commission approval, unless the new purchasers are in privity. (Example 7) in the instructions in Form 323 (quoted in par. 702, above, from the Review Board's memorandum opinion and order adding the transfer of control issue), it says, is only tenable if the purchasers are in privity, and must be so read to be consonant with the statement it illustrates and the statute. As previously quoted, section 310(b) reads in part: "Any such application [for consent to transfer of control] shall be disposed of as if the proposed transferee or assignee were making application for the permit or license in question." WHDH argues:

> It is decisionally significant that with all of the information on changes in ownership of Herald-Traveler stock available to the parties to this proceeding * * * none who claims a violation of 310(b) has taken place has been able to point out when an application under 310(b) should have been filed, who should have filed as transferor, who should have filed as transferee, or what stock transfer should have been submitted for approval.

707. The concluding quotation in the preceding paragraph is, as WHDH says, decisive. It would have been impossible to comply with the terms of the statute. De jure control, in the sense that the identity of persons owning 50 percent or more of Herald-Traveler stock was now different, as a result of many stock sales, was unquestionably diffused among the new stockholders. However, though WHDH (Herald-Traveler) knew from the stock transfer sheets of the ownership changes, it could not, in the absence of privity among a group holding 50 percent or more, have filed an application for consent to transfer of control on behalf of any known person or group. The case of publicly traded, widely held stock, in which the arithmetical accumulation of discretely owned shares by new stockholders exceeds 50 percent must obviously be treated differently from that of a small corporation with relatively few shares closely held. To finish the quotation ending the preceding paragraph: "A claim of violation of 310(b) in these circumstances must rest upon an untenable interpretation of that section. Any such reading precludes either compliance or enforcement and must be rejected." The Commission's 1948 warning, notice 20805, *Procedure on Transfer and Assignment of Licenses*, 4 R.R. 342, that doubts will not be resolved in favor of an offending licensee and that post hoc ownership reports are not an acceptable substitute for prior authorization, does not apply to the present situation. BBI writes (step IV, p. 60), in words which can be taken to apply to this conclusion, that "the door will be opened for transfer of any broadcast license so long as corporate stock is passed in accordance with a carefully prepared plan for change of ownership by bits and pieces." The short answer is that no preconcert was indicated in the transfer of Herald-Traveler stock, and that the present conclusion is based on the terms of the statute as now written.

708. In any event, even if it were to be ruled that there was a transfer of de jure control covered by the statute, WHDH's failure, in the circumstances, to seek Commission approval beforehand (assuming that were possible) could only by the most unyielding view of a licensee's responsibility be held against it. Public notice 20805, referred to above, threatens condign consequences for not obtaining prior Commission approval of a transfer of control, invoking the possibility of a refusal to renew a license or of revocation. Since the warning was couched in terms of possibility, evidently mitigation was not excluded, and so the Commission has tacitly interpreted its notice. In *Pacifica Foundation*, 36 FCC at 152, 1 R.R. 2d at 754, the Commission declared, in granting Pacifica's belated application for transfer of control:

> On the other hand, it is clear that Pacifica did not seek to conceal or misrepresent any facts concerning those who control its affairs, and that the failure to file involved was an excusable one.

These words are equally applicable to WHDH, which has not concealed from or misrepresented to the Commission the operative facts of the many stock transfers. And as will be noted also below, even the implacable BBI recognizes that this is a case of first impression on the passage of de jure control in a publicly held corporation.

709. It would be even more unfair to hold WHDH accountable for failing to realize that the transfusion of ichor from Winslow to Choate and from Choate to Akerson demanded prior Commission approval. Presidential dominance, exercised by Mr. Winslow, as the Commission recognized, was continued by Mr.Choate and Mr. Akerson. For three generations almost untrammeled headship has been in the president. Because of the peculiar but not unique situation of the Herald-Traveler in which management (the president) is in actual control, the election of a new president in fact created a new locus of control. WHDH contends that the president of the Herald-Traveler exercises control virtute officii, and that the Commission need not sanction passage of authority to his successor. Whether this is so is immaterial. For, if there were no Commission precedents on de jure transfer of control in a publicly held corporation, the way was also uncharted in the region now being traversed. As WHDH points out (step IV brief, p. 8): "There has never been a Commission decision or policy statement which suggested, much less required, that prior approval should be, or even could be, obtained before a given individual was * * * appointed or elected to be an officer of a licensee corporation." (The "could be" need not be conceded, as WHDH apparently has in mind an application before the election, whereas an application "could be" filed after election but before the new man assumes office. "Should be" is enough.)

710. By step IV WHDH had apparently abandoned principal reliance on one of the two sets of circumstances it had recounted in step III—that (in addition to the fact that all pertinent changes in ownership have been periodically reported to the Commission) the Commission has many times approved applications by WHDH in actions involving a favorable consideration of WHDH's (Herald-Traveler's) qualifications (see par. 118, above). In view of the disposition of the present matter, it would have been unnecessary to rule on this argument

even if WHDH had continued to press it. Nevertheless, the Review Board's statement in its memorandum opinion and order (2 R.R. 2d at 584) may be quoted as dispositive: "The flaw in the argument is that none of these Commission actions purported to approve a transfer of control, nor was such approval requested by WHDH; the Commission is not estopped from instituting an inquiry into a matter upon which it did not rule and was not requested to rule."

711. It is held:

(*a*) that WHDH's character qualifications have not been adversely affected so that it should be disqualified from comparative consideration; and

(*b*) that the facts do not warrant carrying the matter forward for consideration on the comparative issue. (See par. 801, below.)

712. *Separate issues applicable to Greater Boston II* (par. 10, above). In its memorandum opinion and order adding a "Suburban" issue against Greater Boston II (1 R.R. 2d 954), the Review Board concluded from the pleadings before it that "Greater Boston [II] has not shown that it had independently ascertained Boston's programing needs or made an independent evaluation of the type of programing which would best fulfill those needs." Below, in the comparison, the Hearing Examiner makes some observations about the significance of frenetic ascertainment of program needs. But he is bound by the Board's addition of the Suburban issue, which it made an independent one going to Greater Boston II's basic qualifications, against the Broadcast Bureau's request there that the facts be considered under the comparative issue. With the closing of the record the board's tentative conclusion, quoted above, can be adopted as a final ruling on the inadequacy of Greater Boston II's prehearing activity.

713. Greater Boston II concedes that it has made no survey of community needs for the present proceeding. It abandoned the 10-year-old survey made by Greater Boston I in the old case, as well as the earlier programing proposal, choosing instead to follow (with two exceptions) WHDH's present program format. To establish its awareness of community needs it relies on the lifelong local residence of all but one of its stockholders and their viewing of local television stations. Before examination this would appear to bring Greater Boston II within the Commission's construction of an acceptable ascertainment in a comparative case of programing needs, upheld by the court of appeals in *Community Telecasting Corp.* v. *FCC*, 317 F. 2d 592, 25 R.R. 2035. There, in reaching its decision that the Commission had made a reasoned conclusion on the overall basis upon which its judgment depends (2038), the court said (after noting that the Commission had not required from the winning applicant "proof * * * that it had ascertained the programing needs of the area to be served by surveys among the public and consultation with community leaders," but had "found that Moline [the winner] was familiar with the needs of the proposed service area and intended to serve such needs; in light of the fact that so many officers and directors of Moline, representing 75 percent of its stock, are local residents"): "The record shows that they are engaged in diverse occupations and professions, and because of their active participation throughout a long period in many civic, reli-

gious, charitable, professional, and social organizations, were the very community leaders among whom a survey as to community programing needs would be conducted. Their knowledge and experience in such respects produced a consensus *as a result of their many meetings and discussions* out of which emanated the suggestions for the programs which were incorporated into their proposals" (2037–8) (emphasis supplied).

714. Here, however, there were no formal meetings of Greater Boston II's stockholders or directors before it filed its application. There is no indication in the record that there was any discussion of station policies or community needs at such informal meetings as were held. The only discussion about programing revealed by the evidence was at a meeting of two stockholders, one the prospective general manager, neither of whom was an officer or director. Beyond this the record is silent as to any meetings or discussions of the officers, directors, or other stockholders on the programing needs and interests of the Boston area. From the record it cannot be concluded that, as with Moline's principals, there was any consensus of the Greater Boston II principals as a result of a pooling of their knowledge and experience of the community. All that appears is that the Greater Boston II principals had individually looked upon the WHDH programs and by some kind of osmotic absorption had found them good, whereat they permitted their appointed leaders to say for them, "Yea, we will show almost the same programs." Without evidence of a reasoned consideration by the principals, and of the manner in which they arrived at their opinion on the value of WHDH programs; and in the absence of any alternative showing of recent contacts with community leaders and others for the specific purpose of ascertaining community programing needs and interests, Greater Boston II had not met its burden of proof under the Suburban issue. Precedent requires that its application be denied for this default on a threshold issue alone. *Suburban Broadcasters*, 30 FCC 1021, 20 R.R. 951; *Don L. Huber*, 36 FCC 638, 2 R.R. 2d 243; *Garo W. Ray*, 2 R.R. 2d 399; *Higson-Frank Radio Enterprises*, 36 FCC 1391, 2 R.R. 2d 755; and *Saul M. Miller*, 38 FCC 1374, 5 R.R. 2d 880. As the discussion below will, it is hoped, make clear, the Hearing Examiner has personal reservations, in a comparison, on the exaltation of what may well be a ritualistic activity like ascertainment of community needs. But where the Suburban issue has initiated basic qualification inquiry, he has no choice but to follow prior rulings unreservedly as to the intent of the issue.

715. A purist might contend that the community quotation above is dictum on the indispensability of a consensus through discussion, as there were meetings of the principals; and that there would have been a holding only if there had been no meetings and the court had said that without them local residence is insufficient. And a logician might wonder why long local residence and area activity by a single applicant would have been enough (see, however, parenthetical section of this par. below) without the necessity of his communing with himself, while a group of principals must meet in formal conclave to validate their separate knowledge. But these are niceties which might have been urged someplace else, not here. (The Greater Boston II program

preparations, such as they were, were made and its evidence was received before the Commission's *Policy Statement on Comparative Broadcast Hearings*, 5 R.R. 2d 1901, 1911, issued July 28, 1965 [see also *Seven (7) League Productions, Inc.* (*WIII*), par. 720, below] which refuses to recognize area familiarity alone: "Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.")

716. Greater Boston II fares no better on the antenna site availability issue. Unlike BBI and Charles River, the only antenna site proposed by Greater Boston II is the one now used by WHDH. On the terms of the issue itself, Greater Boston II had the burden of establishing reasonable assurance of being able to secure its proposed antenna site. See *Massillon Broadcasting Co., Inc.*, 22 R.R. 95. It has not met this burden. Although it had written to Mr. Choate, as Herald-Traveler president, suggesting a discussion of its proposal to acquire the WHDH site, by purchase or lease, the Herald-Traveler chose not to reply. In an attempt to make a showing, Greater Boston II called Mr. Akerson, but his testimony did not help it. Though it was conceded that if WHDH could not operate channel 5 it would be faced with the question of disposing of its TV property, and Mr. Akerson testified that it would be his duty to get "the best possible return," he said there were alternatives to the sale or lease to the winner here which would also have to be explored. His testimony (see par. 224, above) offers no assurance to Greater Boston II that it could prevail among the other possible recipients or users of the site. In the circumstances it cannot be concluded that Greater Boston II has demonstrated "reasonable assurance of being able to secure its proposed antenna site." It is realized that Greater Boston II was forced to rely on the testimony of its opponent's president in its struggle to meet the issue. But it is impossible to find that Mr. Akerson was engaging in mere obstructionism to avoid helping a competing party, as the other uses to which the property might be put are, in the absence of proof to the contrary, reasonable, and were plausibly advanced.

717. Greater Boston II has been unable to survive another preliminary heat. For its failure of proof on the site availability issue—whether in addition to or without regard to its showing on the Suburban issue—its application would be entitled to no further consideration, and it need not be an entrant in the comparison below. Nevertheless, its claims will be discussed there.

718. *Comparative issue.* In approaching a comparison one is tempted to long, if only whimsically, for a relatively easy method of choice in which, to adapt Evelyn Waugh's phrase ("The Loved One," ch. 2), lamas would scan the snows for the Dalai licensee. Classically, comparisons are odious. In Commission proceedings they are also onerous, but of course they cannot be shirked.

719. As prologue, the first paragraph of the step III brief of BBI may be quoted in part:

> This case is no run of the mine comparative television proceeding. The respects in which it is unique include: it is the longest comparative broadcast hearing

ever held before the Commission [a distinction which the Hearing Examiner would have gladly averted, had it been possible]; it is the first litigated case to raise the question of transfer of control because of the trading of publicly held stock; it involves a television operation without a regular license for a longer period than any case in the Commission's history; there is at stake the only VHF frequency in the top 10 markets in the country which is not occupied under a regular license * * *

720. It is also a case testing the implications of the Commission's reservation in its *Policy Statement on Comparative Broadcast Hearings*. 5 R.R. 2d 1901, 1907, fn. 1 ("This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license"), reconsidered, as noted below, in *Seven (7) League Productions, Inc. (WIII)*, 1 FCC 2d 1597, 1598; and see *Community Broadcasting Service, Inc.*, 6 R.R. 2d 589, 595.

721. *WHDH's proposed conclusions (step III)*. Recognizing that it would be unlikely to prevail under the conventional criteria, which chiefly purport to assess—necessarily a priori—the reliability of an applicant's promises in a comparative proceeding, WHDH relies (apart perhaps from the local residence and civic activity of its officers and directors and key staff members. Of the three officer-stockholders previously named [Mr. Akerson, Mr. Talmadge, and Mr. McGrath, managing director], Mr. Akerson is not involved in day-to-day operation of the TV station, nor is Mr. Talmadge except for his corporate fiscal duties) on what it considers proven and convincing facts. It contends that it is a progressive operating station, with a superior plant and an experienced veteran staff "with a remarkable record of tenure"; and that especially "in the area of public service programs, the WHDH operation has been outstanding and its programs have been of a quality and number rarely matched by any independent or local station in the United States." (BBI is in error, unless it is being satirical, in writing (step IV, p. 55), that WHDH wants the Commission to "decide this case on the basis of the established WHDH staff and its fine equipment, particularly its always available standby generator." Nor has WHDH found "itself reduced to claiming superiority only under the long since rejected criteria of equipment and staff." In fact, at p. 3C–3 of its step IV brief, it cited *Office of Communication* v. *FCC*, 7 R.R. 2d 2001, 2015, referred to below. In any event, WHDH, as an operating station, is in a different position, in its ability to advance as a preference point its developed staff and equipment, from new applicants in a comparative case, all equally untested [cf. *Fisher Broadcasting Co.*, 19 R.R. 997, 999c].) It contrasts its ability to show this earnest of its future performance with the alleged inherent weaknesses of Charles River and BBI. Charles River's owner will be a charitable foundation, an enterprise assertedly disapproved as an operator of a private business by the U.S. Treasury Department. Mr. Jones, on whom Charles River relies almost completely for program operation, has no television operating experience and "has shown no basis for concluding that he can successfully operate a television station which would provide as good service to the public as WHDH"; while other Charles River principals have had no interest in radio or TV and know little or nothing about it. As to BBI, WHDH

declares that it is "deficient in the field of staff," proposing an executive vice president with only an unsuccessful business record to which he could point, and a president with experience only in UHF educational television operation, involving a minimum of program production, and with allegedly no commercial television experience at all. WHDH cites, to support its claims as a renewing applicant, "entitled to preference over its opponents," *Hearst Radio, Inc.*, 6 R.R. 994, and *Wabash Valley Broadcasting Corp.*, 1 R.R. 2d 573.

722. *Summary of Greater Boston II's proposed conclusions (Brief).* The applicant contends that (*a*) "the demerit which [WHDH] got in the old proceeding still attaches to it. While the Commission has seen fit to gloss over this demerit in the old case this has not yet been passed on by the Court of Appeals. Even if the court agrees with the Commission in its evaluation of the demerit, it should be enough to preclude a grant to WHDH as compared to applicants who have no such demerit"; (*b*) because WHDH acquired its CP "by a process which was tainted, its record in operating the station cannot be allowed to help it"; (*c*) WHDH is not locally owned; (*d*) the issue of diversification must weigh heavily against it; from 1957 to 1965 WHDH paid $7 million in cash dividends to its newspaper-operating parent, the Herald-Traveler; and (*e*) of Greater Boston II, Charles River, and BBI, only Greater Boston II has made a realistic proposal; it "would preserve the good programs which have been developed on channel 5," and "save the jobs of the people employed there and make use of the experience and expertise they have gained in the past few years"; in contrast "the proposals of Charles River and BBI are no more than a mishmash of the unrealistic and impractical gimmicks which have been devised by counsel and consultants during the course of some 15 years of comparative television hearings in usually futile efforts to impress the Commission. Greater Boston should be preferred over Charles River and BBI on the basis of its honesty, practicality, realism, and sincerity—not to mention the fact that most of its principals have demonstrated an interest in TV in Boston over the past dozen years, starting long before Ted Jones, Tom Cabot, and Matt Brown discovered there was a lot of money in television."

723. *Summary of Charles River's proposed conclusions (Step III, pp. 129 ff.).* In addition to attacking WHDH, Charles River and BBI naturally try to knock each other off. Charles River argues that WHDH has not met the burden of the qualifying issues (disposed of above) and that it is not entitled to comparative consideration. In any event, in a comparison WHDH "cannot escape the taint of the ex parte contacts made by Robert B. Choate in an attempt to influence the Commission in its initial grant; a taint which has been expressly condoned and ratified by the boards of directors of the Herald-Traveler and of WHDH which reelected Mr. Choate as an officer and continued to entrust the management of the television station to Mr. Choate, even after his misconduct had resulted in the assessment by the Commission of a demerit against WHDH." There is a disparity between WHDH's promise and performance which betokens unreliability for the future. There is no assurance of stability in the WHDH management, with the additional unattractive prospect that

Mr. Garfinkle, in control of the largest single block of Herald-Traveler stock, "holds the leverage in the unsettled management situation," coupled with the alleged handicap of "the complete lack of candor exhibited by Mr. Akerson, a man to whom the Herald-Traveler board entrusts major decisions with regard to WHDH." A grant "would serve to entrench the Herald-Traveler in its control of the media of mass communications in the Boston market." As to BBI, Charles River says, in effect, that it is a factitious organization, the brain child of Mr. David, who in trying to put together a "paper perfect" proposal "lost sight of the fact that in addition to impressing the Commission a proposal must be practical." (Charles River also takes a swipe at Mr. David's previous business experience.) Charles River asserts that BBI "submitted a completely unrealistic and unworkable local live programing proposal which exceeded by 15 percent the local live programing of any other operating network affiliate in the United States," made without attempting to check the preemption problem. BBI's integration proposal is "so excessive and artificial that absolutely no reliance can be placed on it." "The program and integration proposals when considered together with the various artifices submitted in order to impress the Commission, such as the free political time policy and the proposed 24-hour operation, demonstrate that BBI has neither the stability nor the responsibility to be entrusted with a grant pursuant to which it would be expected to operate a television station in the interest of the Boston community."

724. Contrasting itself with its opponents, Charles River declares that it "is the type of locally-oriented group on which the Commission can place full reliance." Its principals are "solid, successful businessmen" with long-time residence and civic and cultural activity in the Boston area (Mr. Saudek, "although not a Boston resident has many ties with the community. His outstanding broadcast record makes him an effective supplement to the group"). Mr. Jones is "an experienced broadcaster whose idealism is reflected in the success of Stations WCRB–AM and FM as serious concert music stations." Charles River's planning was accomplished "in a businesslike manner, adopting policies and a program schedule which are both high-minded and capable of effectuation." It did not try merely to impress the Commission, and its "well-rounded schedule of programs is calculated to serve the needs and interests of the Boston community; needs and interests as determined by the principals."

725. *Summary of BBI's proposed conclusions* (*Step III, pp. 73 ff.*). BBI also would disqualify WHDH initially for violation of the Communications Act and Commission rules, and for "general and specific character defects as established on this record." Under the comparative issue, "the best practicable service" of all the applicants is proposed by BBI, "which alone proposes a 24-hour-per-day operation with truly significant amounts of local programing—including prime time programing—designed to best exploit the vast educational and cultural resources of the Boston community." Because of its superior preparation and planning and its "high degree of integration complemented by local residence and broadcast experience in television and related fields," it "offers the best assurance that its

program proposal will be fully effectuated." A grant to BBI, unlike one to WHDH, and to a lesser extent to Charles River (locally by reason of Mr. Jones' radio and nationally on account of Mrs. Lombard's husband's newspaper ownership interests) "would not run afoul of the Commission's concern with concentration of control of mass communications media, but, on the contrary, would contribute to diversity, thereby furthering a major policy goal of the Commission." Also, "the character of [the BBI] principals is without serious flaw." BBI disparages Charles River's "charity angle," which Charles River had originally thought of as a comparative advantage, as in reality a liability because it will prevent meaningful political programing and "it so insulates its nominal principals from a financial stake in the success or failure of the television operation that no comparative credit can be awarded their limited integration proposals, thereby eliminating comparative consideration of their local residence and the moderate experience of their nonowner 'principals.'" Apart from the "interdicting effect of the foundation, Charles River rates at best a poor second to BBI in each of the comparative criteria save diversification ["where it must also give way to Greater Boston"]. Its program proposal is barely superior to that of WHDH, and its poor planning leaves substantial doubt as to its ability to effectuate the proposal. Its integration proposal is more limited and far less precise, than that of BBI, and the essentially local character of the applicant will not be translated into programing direction through meaningful participation by the 'principals' in the proposed operation with the exception of Jones. However, Jones' past record and equivocal testimony and demeanor detract significantly from the presumptions which might normally inure to one of his length of experience, and further erode confidence that the Charles River proposal will be effectuated."

726. Turning to Greater Boston II, BBI says that "while Greater Boston [II] has no past broadcast record, it would adopt with alacrity that of WHDH, together with its demonstrated failures. If Greater Boston would do no better with the facility than WHDH, it is unlikely that it would do much worse. A grant to Greater Boston would restore the ownership of the facility to an essentially local group which, though little can be known of them from this record, must represent some improvement over the nonlocally owned Herald-Traveler with its demonstrated character defects. Moreover, Greater Boston is without other ownership interests in broadcasting or other mass media, and, on this ground alone, it is entitled to a significant preference over WHDH." In conclusion, BBI rates itself "far above the others," with Charles River slightly excelling Greater Boston II, which, in turn, is ahead of WHDH.

727. First, one must decide the status of WHDH. Here the ex parte contacts enter into the calculation. It has already been held that the Commission never held that Mr. Choate's heavy-handed attempts to impress his personality and ingratiate himself with Mr. McConnaughey were in the slightest degree effective; for all that resulted he might as well have sent letters to Santa Claus. Whatever his intentions might have been there was no subversion. The Commission decided the original case in a surgically antiseptic atmosphere. So

the Hearing Examiner reads the Commission's decision of July 14, 1960, 20 R.R. 395, and its sequels, including the court's order of January 19, 1961, 111 U.S. App. D.C. 144, 295 F. 2d 131, 20 R.R. 2096a, approving the Commission's findings and recommendation. The Commission had found, in the court's summary: "* * * no member of the Commission who participated in the instant case should have disqualified himself; * * * there were attempts to influence members of the Commission, but no actual influence occurred; * * * certain conduct of one Choate, a principal of WHDH, Inc., and of one Clark, a principal of Massachusetts Bay Telecasters, has been found attributable to such parties; * * * the original grant to WHDH was not void ab initio and that no applicant has been disqualified to receive a grant of its application, but that the grant to WHDH is voidable and that action should be taken to set it aside; and * * * the nondisqualifying conduct of WHDH and of Massachusetts Bay Telecasters has nevertheless been such as to reflect adversely upon such applicants from a comparative standpoint."

728. In its September 1962, decision, the Commission visited upon WHDH the consequences of Mr. Choate's inexcusable approaches. It is fair to venture that had it not been for Greater Boston I's misfortune in having Mr. Henry's response to the application and his testimony mercilessly interpreted, Greater Boston I would have won over WHDH despite WHDH's superiority under the criteria, where the choice came down to a preference for WHDH's broadcast experience and record over Greater Boston I's prospect of better media diversification, 24 R.R. at 260 (Mr. Choate's and Mr. Henry's conduct were held to "provide no justification for assessing a larger demerit against one applicant than the other," 24 R.R. at 259). Instead, faute de mieux, as it were, WHDH's license was reinstated, but for 4 months only because of the Commission concern with "the inroads made by WHDH upon the rules governing fair and orderly adjudication." By specifying a sure period (January 26–March 26, 1963) for the filing of competing applications, the Commission implicitly invited others to file for channel 5.

729. Only superficially ambiguous is WHDH's position. On examination the ambiguity disappears. In approving WHDH's application for a short term only, the Commission neither blessed nor irrevocably condemned it, but allowed it to live, knowing that its Mayfly's term would be extended by operation of the APA's section 9, section 307(d) of the Communications Act, and rule 1.62, pending final decision after hearing on its application. The Commission, by its actions, defined the nature of WHDH's tenure. It is not an occupant under an ordinary authorization, but one who was expected shortly to justify its claim to continued existence. All licensees are subject to the possibility that someone may try for their places, but as Commission records show, the likelihood of a contest between an incumbent and another is small; in the present case, however, it did not take unusual prescience to forecast the filing of competing applications for the WHDH channel. In this inevitable contest it could not have been the Commission's expectation that WHDH would be entitled to assert competitive advantages merely because it is a renewing

licensee; nor can Hearst and Wabash Valley be regarded as supporting any such claim, if WHDH meant to advance it by its citation of these cases (par. 721, above).

730. But this, of course, does not mean that WHDH loses the benefits, if any, of its TV record, compiled since its original grant. And here construction of Wabash Valley (the later of the two cases cited), is in order. As the Hearing Examiner in the present case also wrote the *Wabash Valley Initial Decision*, 20 R.R. 59, which the Commission adopted, 1 R.R. 2d 573, 575, he presumes to say, not what the Commission thought he meant when it adopted the initial decision (as that is beyond his competence), but what he himself thinks he meant when he wrote it. The key sentence reads (it is here transcribed verbatim, and punctuated as written, from the original release; the sentence is also correctly printed in 20 R.R. at 84):

> Under the circumstances [of an existing station with a good operating record, and of assurance of its continuance, competing against a newcomer for the occupied channel] it would demand a presentation by the newcomer extraordinary to a degree certainly not attained by Livesay [the newcomer], to justify ousting the incumbent.

This means that a proven past record of good performance which may confidently be expected to continue is a safer index of future operation in the public interest than the mere promises of performance of the competitor, as the validity of the latter can only be assayed through the criteria; it tacitly recognizes that the criteria, untested empirically though they are, are helpful, and indeed may be indispensable, in the usual contest of new applicants; but that they are only a means of predicting ability to comply with proposals which, as already indicated, are inferior to a good operating record by an existing station. (The discussion in the *Hearst Conclusions*, 6 R.R. 994, 1026 ff., supports this construction. It might be noted that when Hearst was decided in 1951, section 307(d) of the Communications Act provided that "action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications." This limitation was deleted by the Communications Act amendments, 1952, so that there is no longer need for concern whether an operating record can be considered—a matter which the Commission felt it necessary to face in *Hearst*, 6 R.R. at 1026. See, also, *Office of Communication* v. *FCC*, 7 R.R. 2d 2001, 2015, where the Court of Appeals said: "It is important to bear in mind, moreover, that although in granting an initial license the Commission must of necessity engage in some degree of forecasting future performance, in a renewal proceeding past performance is its best criterion. When past performance is in conflict with the public interest, a very heavy burden rests on the renewal applicant to show how a renewal can be reconciled with the public interest. Like public officials charged with a public trust, a renewal applicant * * * must literally run on his record.") But when a new applicant's case is extraordinary in the sense that future operation in the public interest can more confidently be predicted for it than from the incumbent's operating record (a degree to which the pretender in Wabash Valley did not attain), the newcomer will win. It is not necessary now to spell out situations,

as the present case involves the question. WHDH, therefore, has a preference, if at all, not because it is an applicant for renewal but because it has an operating record and its very existence as a functioning, manned station to advance against its opponents, whose promises, after all, are as yet just so much talk. It is not believed that the validity of this distinction between a broadcast record and the other indicia is affected by the Commission's statement in *Seven (7) League Productions, Inc.* (WIII), 1 FCC 2d 1597, 1598:

> On consideration, the Commission has concluded that the policy statement [5 R.R. 2d 1901] should govern the introduction of evidence in this and similar proceedings where a renewal application is contested. For a recent discussion of matters which may be adduced under the new comparative issue see *In re Keith L. Reising*, adopted October 20, 1965, 1 FCC 2d 1082. *However, we wish to make clear that the parties will be free to urge any arguments they may deem applicable concerning the relative weight to be afforded* [sic] *the evidence bearing on the various comparative factors* (emphasis supplied).

731. As an existing licensee WHDH's operating record would be entitled to the same persuasiveness as any other station's in similar circumstances. Now, however, additional factors enter the picture. (*a*) Since it original grant WHDH's license has been in hazard during the appeals, and since September 1962, it has been operating under a different but no less unsettling danger of extinction. (*b*) Mr. Choate died in December 1963, after this case was designated for comparative hearing. These can be taken up in inverse order.

732. Greater Boston II, Charles River and BBI would have WHDH forever damned by the Choate ex parte contacts, contending, in essence, that they generated a kind of equitable servitude to which WHDH must remain subject, or, to use a triter figure for the argument, that WHDH wears them like an albatross. To the other applicants, Mr. Choate's death did not absolve WHDH from the consequences of Mr. Choate's misbehavior. Charles River, which was of course not a party to the original case and feels free to argue the point, goes further by way of amateur psychoanalysis than the Commission itself was willing to say about the 1957 Commission. It says (step III, proposed conclusions, p. 25): "It is impossible to assess the effect of Mr. Choate's meetings with the Chairman [Mr. McConnaughey] on the ultimate decision. * * * If Mr. Choate was successful in his demonstration, this could have had a very definite though subtle effect on the Chairman's assessment of the comparative qualifications of the competing applicants without his even being aware of it. Since Mr. Choate's conduct was calculated to influence the Commission during the course of the first comparative proceeding and that proceeding resulted in a grant to WHDH, his conduct must be held to pervade the grant itself and accordingly cannot be purged by either the subsequent conduct of WHDH or by Mr. Choate's death in 1963."

733. Moreover, says Charles River, Mr. Choate's death did not terminate the consequences of his ex parte contacts, for WHDH "ratified" his actions as a corporation by reelecting him to office while WHDH was under a cloud; and both Charles River and BBI emphasize that individual directors in testimony here did not voice disapproval of his conduct.

734. Turning first to Charles River's effort to attribute a practical result to Mr. Choate's conversations and hospitality, it need only be said that this record does not tempt the Hearing Examiner to indulge in the luxury of overruling the Commission and perhaps the Court of Appeals by holding the original grant void and not merely voidable. Since there was no additional evidence on the ex parte contacts themselves (as distinguished from testimony on the knowledge of Mr. Choate's associates about them), this is what the ruling which Charles River requests would amount to.

735. As to ratification and the absence of vocal disassociation, Charles River and BBI try to prove too much. The Commission did not make Mr. Choate an outlaw, or even send him to Coventry. Nothing that the Commission did made it improper for Mr. Choate's associates to recognize his competence as an executive and to avail themselves of his long experience. They did not, simply by reelecting him, approve his ex parte contacts any more than they necessarily approved anything else they might have known in Mr. Choate's past. One cannot expect directors to pass a resolution condemning a colleague whose services they evidently valued and wished to retain. Similarly, one cannot ask of witnesses (whether Mr. Akerson, who knew in advance of Mr. Choate's meeting with Mr. McConnaughey, or the other directors, who learned about it afterwards from newspaper accounts), the sanctimony of castigating an old friend to pile up points for themselves here or in the hereafter. Though the Hearing Examiner accepts as valid the guidance of past rulings in the case—that it is improper to discuss ex parte with an agency member a legislative proposal designed to remove a potential disability from a party in an adjudicative matter pending before the agency—he recognizes that this pronouncement does not deprive others of the right to their own, even if mistaken, views of the circumstances. So he cannot declare Mr. Akerson immoral because, as Charles River puts it (step III, proposed conclusions, p. 27) he "testified during the course of these proceedings that he would still think it appropriate to discuss legislation bearing on an issue in a hearing in which he was involved with a member of the Commission while that matter was pending before the Commission."

736. It will be recalled that the court of appeals approved the Commission's finding (par. 727, above) that Mr. Choate's "conduct * * * has been found attributable to such part[y]." Does this mean that WHDH continues to bear responsibility until the Charles River ceases to flow? Or did the Commission exhaust the consequences of Mr. Choate's conduct by limiting WHDH's license to 4 months and thrusting it into a competitive hearing? It is hoped that it has been made clear that the Hearing Examiner is proceeding on the already recognized basis that Mr. Choate was unsuccessful. WHDH as a corporation gained nothing from his efforts. It would have been immeasurably better off had Mr. Choate's idea died at birth. WHDH has suffered rather than benefited from his ex parte activity. Without it WHDH would have had a full-term grant which it had an excellent chance of retaining past appeal—indeed, as noted in the preliminary statement, paragraph 2, above, the court of appeals found no error in the comparative aspects of the original grant to it.

737. In remanding the first proceeding in April 1964, the court of appeals envisaged an inquiry into the changes in "the affairs and prospects of WHDH by the death of Mr. Choate" (emphasis supplied). If the Hearing Examiner correctly interprets this, the court did not exclude the possibility that Mr. Choate's death put an end to the baleful aftermath of his officious intermeddling. Otherwise it would hardly have returned the case for further hearing, or at least it would have given some directions as to the bounds of the Commission's consideration. It left the Commission free, initially at least, to put the construction it thought appropriate upon the death of Mr. Choate as it affected the prospects—a term embracing the chances of success—of WHDH in the remand and renewal proceedings. The court had in mind the net assay, a balancing of advantages and disadvantages. The only advantage—if one my be pardoned for using such a word in connection with a death—would be the lifting of any burden represented by Mr. Choate's presence and the elimination of the cause of the demerit against WHDH, to use the court's language. Otherwise, the ledger would have been all debits.

738. Had his fellow directors participated with Mr. Choate in his ex parte excursion, by planning or deed, his death would have been merely that of one of the conspirators, with the rest continuing to bear the guilt. But the record does not support a finding that the imperious Mr. Choate had confided to his associates (other than Mr. Akerson, who could not have stopped him anyway) that he was about to visit Mr. McConnaughey, or that they knew about his visit until after the event. It has not been overlooked that the Commission, in a finding approved by the court, said that Mr. Choate's actions were attributable to WHDH. But in the circumstances it would be almost sadistic to perpetuate a curse against a corporation for something which had not helped but had hurt it merely—for it comes down to this—to demonstrate the inviolability of the Commission's procedures. Such Biblical fury is not properly a part of the administrative process. There is no need to deter the present principals of WHDH and the Herald-Traveler from doing what they cannot be charged with having done in the past; extending the disability would serve no prophylactic but only an emptily minatory purpose.

739. It is therefore held that because of Mr. Choate's death his ex parte contacts are no longer a factor in the comparative consideration. The ignorance of the other directors, however, may have been symptomatic of their general remoteness from station operation, a legitimate element of the inquiry below.

740. WHDH's operation since 1957 can be divided into two periods. (*a*) In the first, from November 1957, to September 1962, there was a continuing danger that it would lose its authorization as a result of appeals and remands; its tenure was never as fixed as the ordinary grantee's, who builds his station after appeal dates are past, and only the renewal date represents a theoretical (but, as indicated above very seldom an actual) threat to his continuance. If, during this first period, WHDH–TV's programing was praiseworthy, it could not be put down to operation under forced draft, for there was no prospect of an unusual challenge which might have induced WHDH to perform

beyond its common powers. In fact, since its occupancy was uncertain and subject to termination, there was reason for it to operate below the capacity it might have displayed had it been able to make plans in an atmosphere of less uncertainty. (*b*) From September 1962, to the hearing, undoubtedly WHDH has been goaded to make a good showing for comparison. Evaluation of its program performance for this period must take this into account, but it is impossible to assign a percentage by which the persuasiveness of its presentation should be diminished. But in estimating the probative worth of the more recent programing, it cannot be forgotten that in the earlier period, as explained above, there were countervailing factors tending toward below-normal performance. (*c*) Lastly—though this is of little significance—there is an overlap; the first period has never ended, as the court has retained jurisdiction of the appeals. In any event, however, the operative period under (*b*) here offered for consideration was only until the end of 1963.

741. Charles River and BBI proposed detailed findings on WHDH's character deficiencies. Some of these proposals the Hearing Examiner passed over almost completely. Others he mentioned at greater length, but not always in the detail suggested. Thus, almost ignored have been findings on WHDH's alleged improper logging practices. WHDH comments (step III, p. B(b)(6)–1) that "the game of needling the witness [to elicit testimony of mislogging] is held in somewhat the same regard among radio lawyers as pigsticking was held by the Bengal lancers," the witness having "to run the gauntlet between rule 73.670(2) (or its counterparts for AM and FM) and the superficially similar, but fundamentally quite different, definitions contained in item 2 of section IV of the Commission's program forms." WHDH concedes that there may have been some borderline errors in reporting the length of spot announcements, and occasional mistakes in classifying spots. But, it says, "there was more than ample room between the number shown and an amount that the Commission has, in many, many cases, recognized as entirely reasonable, to have included all of the 'stay-tuned' announcements without raising an eyebrow as to possible overcommercialization * * * Charles River may be said to have followed tradition in trying to make something out of the WHDH program logs and the composite week breakdown in the renewal application. We submit, however, that the examiner should also follow tradition and ignore this abortive effort as having no decisional significance" (step III, pp. B(b)(6)–3–4). The Hearing Examiner agrees. There are probably few operating applicants who are not vulnerable to niggling complaints of the kind here rejected.

742. Also worth only relatively brief disposition are Charles River's and BBI's allegations of Mr. Akerson's lack of candor. He characterized his relationship with Mr. Choate as harmonious, and his succession to the presidency as amicable, whereas Charles River and BBI maintain that there were differences between them over the profitability of retaining the newspapers. Apart from the fact that Mr. Akerson was a witness and so his testimony can broadly be scrutinized for discrepancies supposedly revealing character defects, as WHDH points out (step III, p. B(b)(3)–2) the intracorporate attitudes of

Herald-Traveler officials and the atmosphere in which transfer of office was accomplished are not part of the WHDH case, but are incidental to the affairs of the Herald-Traveler, "which, as such, has no case before the examiner." (WHDH passes over the question whether, if the facts were properly established, they might indicate organizational instability.) But Mr. Akerson's testimonial reliability has not been successfully attacked. The attempts to impeach it are either of uncertain import ((*a*) Testimony that Mr. Choate had been willing to sound out the proposed purchase of the newspapers by the Boston Globe as indicating that he wanted to sell them. (*b*) The ambiguous significance of the memorandum reluctantly given by Mr. Akerson to union officials as indicative of a rift between him and Mr. Choate, already explained in the findings of fact. (*c*) The fact that the Choate Estate stock wound up in the hands of the Midwest group [not mentioned in the findings of fact], as showing that Mr. Choate's widow bore a residual hostility against Mr. Akerson—Mrs. Choate was not called as a witness by Charles River or BBI); or rest upon a contradiction which on analysis is not condemnatory (Mr. Akerson had first denied that he had spoken to a Wall Street Journal reporter about executive succession, and then, after the reporter testified to the contrary, said on redirect, as Charles River writes (step III, proposed conclusions, p. 58), "that he had talked to newspaper reporters and would have given information similar to that which appeared in the Wall Street Journal to the reporter for the Wall Street Journal *but that he had no recollection of having spoken to him at the time in question*" [emphasis supplied]); or involve no contradiction at all (George Frazier, a former Herald-Traveler writer, had filed a complaint in the Massachusetts courts against it, seeking as damages continuing compensation from the Herald-Traveler under his contract and the right to work for others while drawing such compensation. Mr. Akerson testified here that Mr. Frazier was free to write for any other newspaper. At the time he testified, there was pending a pleading, responsive to Mr. Frazier's complaint, prepared by the Herald-Traveler's counsel and signed on its behalf by Mr. Akerson, in which it sought to enjoin Mr. Frazier from performing any services for another newspaper. But, as WHDH points out (step III, p. B(a)–4), "The answer, in effect, contended that Frazier could not assert rights under a contract and at the same time avoid its obligations [that is, draw pay from the Herald-Traveler without working for it]. It involves no contradiction.").

743. The willingness of other applicants to take over almost intact the WHDH television plant and staff is a recognition of the adequacy of the station's technical equipment and personnel to the production of a demanding schedule of black-and-white and color programs.

744. Licensees have wide discretion in programing. The Commission does not—indeed cannot—dictate to them, beyond certain statutory mandates, the kind of programs they should broadcast to serve the "public interest." (See *Commission Policy on Programing*, 20 R.R. 1901.) With this discretion there is, however, a correlative vocational hazard: that they may be held accountable, on an appropriate occasion like a comparative hearing, not because particular programs were

or were not carried, but because they failed to display an imaginative concern for their entire potential audience. (See *Fisher Broadcasting Co.*, 19 R.R. 999c, where the Commission said: "We * * * feel that the application of standards [to broadcast records] such as initiative and imagination is correct.") For example, they may betray an inadequacy by emphasizing tawdry entertainment to the exclusion of more intellectually attractive shows; they may reveal their remoteness from the community's life by not scheduling discussions of important local issues; a plethora of programs appealing to only one segment of the audience and barring the presentation of programs of greater interest to others may be an index of their narrow outlook. In certain cases, licensees may specialize, but ordinarily their duty is toward the whole community. It may be held that their programing is too parochial. There is no denying that the licensee may find it hard to judge the extent to which he can indulge his own predilections, condition programing by his individual tastes, or satisfy a mass interest only. In an obiter dictum in *Suburban Broadcasters* v. *FCC*, 112 U.S. app. D.C. 257, 302 F. 2d 191, 23 R.R. 2016, 2018, the court of appeals recognized the strains upon a licensee's judgment:

> It may be that a licensee must have freedom to broadcast light opera even if the community likes rock and roll music, although that question is not uncomplicated. Even more complicated is the question whether he may feed a diet of rock and roll music to a community which hungers for opera.

745. Months before the September 1962, decision WHDH-TV manifested a practical regard for the community's welfare by giving vital, sympathetic, and prolonged help to WGBH-TV, the Boston educational station, when its facilities were destroyed by fire. This concern has been demonstrated throughout WHDH-TV's existence in its training of organization representatives for on-the-air presentations, by the very frequent appearances by members of civic groups, and by the encouragement of local talent. The station's children's programs have been commendable, with instructive, informational, and entertaining features. To news programs, which are sufficiently frequent, are assigned elaborate equipment and a sizable staff. An aggressive exploitation of audience interest in other countries was demonstrated by the Asian trip (in cooperation with UNICEF), in the "Green Roots" programs, and in the Brazilian project, even though the last did not result in any Brazilian TV programs over WHDH. The color film on the "Battle of Gettysburg," to tie in with the Centennial Celebration of the Civil War, is discussed in paragraph 165 of the findings of fact.

746. Disagreement with the generalized classification of "Dateline Boston" and "New England Farm and Food Program" was expressed in the findings of fact. But mere nonconformity with the Commission's definitions does not detract from the value of the varied list of programs on "Dateline Boston"; and while the record does not show whether the 1959 recognition of Mr. Kelly's competence as an agricultural broadcaster was primarily for his radio or for his television programs, it was not developed that his agricultural segments on the "Farm and Food Progam" were perfunctorily offered or that they were not seriously designed as part of the total presentation.

747. Programs dealing with public affairs are described in paragraph 155 of the findings of fact. BBI contends (step III, proposed conclusions), that "for the 6-year period of its operation, WHDH was able to point to only 70 locally produced discussion programs [actually 68, but these were in addition to the other programs referred to], or an average of one every 4½ weeks." More significant, however, than this alleged paucity of local discussion programs (for their numerical inadequacy to deal with important local problems was not established in the record and could only be conjectured at best) is the fact that WHDH has exercised licensee discretion by apparently ducking, on occasion, the discussion of certain controversial problems of local interest. A similar timidity may have been masked under its decision not to editorialize, and perhaps in the decision not to carry a defenders program dealing with abortion. (WHDH writes [step IV, reply to proposed conclusions, p. C–3]: "WHDH accepts the concession that it has never editorialized, a factor in minimizing the importance of the 'newspaper ownership' contention.")

748. Criticism of a licensee's scheduling for carrying a plethora—that is, an overabundance—of particular programs was suggested in paragraph 744, above. Because the Hearing Examiner had in mind, as possibly falling within the stricture, the WHDH baseball programs, it is in order to consider them further to see if the term is appropriate. WHDH televises some 55 games a year, all, it is assumed, during the regular baseball season of about 6 months. Taking an average of 3 hours for a game and its preliminaries, the total baseball time is 165 hours. In the 6-month season WHDH broadcasts about 3,500 hours, for a seasonal baseball percentage, generously calculated, of 4.7. It is true that the games have sometimes prevented the broadcast of other programs, but they are scheduled in advance and the station may understandably wish to avoid the roars of viewers who, although unwilling to attend the game itself, would be furious if a game were not completed. While the seasonal percentage is fairly substantial, the record does not show how many games were broadcast in prime evening time and how many in the afternoon, nor, except in a few instances, the programs preempted. It cannot be concluded that WHDH has unbalanced its program schedule through an excess of games. (It might be added that in "Toujours le sport," the leading article of "The Listener" of June 30, 1966, at p. 936, the BBC took wry note of complaints from nonfans that it would be "devoting too much time to the televising of the [World Cup soccer championship] matches" in London.)

749. It has not been thought necessary to mention again all the programs described, in greater or less detail, in the findings of fact. From the foregoing paragraphs of the conclusions it is fair to say that on balance WHDH's conception of its programing responsibilities is in reasonable, if not perfect, accord with the ideals positively and negatively suggested in paragraph 744, above. In only one general area—local discussion and failure to editorialize—was a reservation regarding its performance indicated.

750. It is hoped that it is evident from paragraph 749 above, that the persuasiveness of WHDH's past performance as indicative of the

future is only slightly abated, if at all. The period during which it might reasonably have dissembled its attitudes was proportionately short. The greater part of its record was established before September 1962, when, as explained in paragraph 740, it had no special incentive to show off.

751. In evaluating the promise of continuance of present practices and policies management and organizational history and stability—or instability—are important considerations. The Herald-Traveler is a publicly owned corporation with individual sizable but by no means controlling concentrations of stock ownership. Its internal government may not fit the pattern of a smaller corporation, but it is not materially different from that of many other companies of similar size and stock distribution. It would be well if all directors were more than nominally in direct overall charge of corporate affairs. The Herald-Traveler Board, however, is not alone in its delegation of almost all management functions and responsibilities to a strong executive. The question is not whether there should be approval of the Herald-Traveler's administrative system, but whether it bodes ill for the persistence of its present TV operation. With this in mind, it must be held that continuity may reasonably be expected. It is difficult to perceive why the executive dominance manifested by three successive Herald-Traveler heads offers less assurance than would a presidency classically subservient to a board of directors. There had apparently been no noteworthy external threats to the "Puritan" calm of the Herald-Traveler offices until the Midwest group stirred up some action but failed in its prime objectives. The findings of fact recited in detail the manner in which the Garfinkle, Blair, and Muller interests acquired their stock (and were similarly detailed about the Rosenfield-Ruan acquisitions). What was common to the owners of these three substantial blocks of stock was their expressed regard for the present management of the Herald-Traveler; there is nothing to indicate, apart from a general but purely sentimentalized realization that anything may change, that the present amicable relationships will be disrupted. Much is made by Charles River of the sinister potential of Mr. Garfinkle as a controlling force (step III, proposed conclusions, p. 53; and see BBI step II, p. 146). For informational purposes (and peering through the transparent trust), incidents of Mr. Garfinkle's business history were set out at length in the findings of fact. But it demands an intuitive leap not justified by the record for a conclusion that Mr. Garfinkle's friendship is so mercurial that his admiration for Mr. Akerson will be replaced by allegiance to someone unknown to swing control to an undesirable person or group. It is absurd to emphasize that in this analysis the mortality of Mr. Akerson and other members of the present Herald-Traveler management has not been overlooked. But within the limits of human expectations there is no reason to conclude that corporate control by present management in itself is a portent of a possible improper change in WHDH's television practices and policies.

752. Enough was written in the findings of fact to foreshadow the inference to be drawn from the facts of WHDH's alleged misrepresentations and concealments in reports to the Commission. That recital was not one of unalloyed approval. There is no doubt that, as shown

in the findings of fact, WHDH has been remiss in at least some of its reporting obligations, and that it has on occasion chosen to interpret Commission requirements by the standard of its own convenience rather than by that of strict compliance. Nevertheless, and without depreciating the importance of candor and complete informativeness in reports to the Commission, it must be concluded that the heinousness of WHDH's conduct lies more in the eyes of its opponents than in those of a more impartial observer. The incompleteness of WHDH's reports were due not to a studied attempt to mislead the Commission, but as just indicated and as is apparent from the findings of fact, to a misdirected and mistaken construction of its responsibilities. Viewed singly or in combination, it would be an unwarranted concession to advocacy to regard the reporting violations as a significant demerit.

753. Probably no more distinguished persons than those numbered among the present applicants have ever submitted their qualifications for this agency's inspection. While wealthy businessmen are common in TV applicants, they seldom have as stockholders noted historians and academicians, physicists, biologists, inventors, economists, anthropologists, physicians, captains of industry and services, financiers, judges, public officials, and producers. Most of BBI's stockholders are area residents and civic doers, and about two-thirds of its stockholders would be integrated, or would at least actively participate in station operation for a portion of their time varying from 100 percent down to a couple of hours a week. BBI has virtually no associations with any other communications media (see par. 478, above). Charles River is almost entirely locally owned, and its stockholders are active in local affairs, but its claimed integration is not nearly as inclusive as BBI's. Charles River has some association with other communications media through Mr. Jones, and more remotely, geographically and personally, perhaps through Mrs. Lombard. Both BBI and Charles River had the wit to ally themselves with persons having broadcast or TV operating and production experience, BBI with Mr. Burdick and Mr. Jaffe's organization, and Charles River with Mr. Jones (as to whom it is probably more accurate to say that he had the wit to ally himself with a goodly group) and Mr. Saudek. Each applicant attempted to meet and pass the Suburban test.

754. It has already been indicated that a going TV station has a certain dialectical advantage over a new applicant because it is there; it has been on the air day in and day out for years, meeting and, since it has survived, apparently overcoming the thousand problems which must arise in a business combining entertainment, news, and discussion of public affairs, among its other functions. The logic that must be applied to predict the continuance of its previous activity is simple—with reasonable assurance that there will be no significant change in those responsible for its past record, or in its policies, the inevitable conclusion follows. But for an applicant who must resort to the criteria the reasoning must be more complicated. There has never been a statistical analysis of the reliability of the criteria as guides to a perplexed administrative body. For example, it is not known whether the run of stations, locally owned and managed by participants in civic affairs, are more responsive to local needs and interests than the net-

work owned-and-operated stations (o & o's), absentee-owned but perhaps operated by local residents and, of course, with no day-to-day integration. (For an illuminating account of independence from central control shown by some o & o stations, see Variety, June 29, 1966, p. 25: "Odd Couple: Radio Web & O & O. Often Differ in Objectives.") Though the criteria probably create a type of ownership which the Commission is trying to encourage—media-diversified, locally-owned, integrated, for example—whether there will be a responsive, locally-oriented, and fair-minded operation can only be conjectural. The danger has always been that the criteria have transcended their role as means and have become ends in themselves. Appraisal of the quality of competing applicants' compliance with the Suburban rule, to be described shortly, is an example of this tendency.

755. The foregoing should not be read as a sweeping criticism of the criteria, for, as said before in these Conclusions, they have their very important uses. They offer a reasonable method of comparing new applicants, and if their prophetic values have never been buttressed by an empirical study, they are no different from other universally accepted beliefs in law. (For instance, it is an element of faith that dying declarants are prima facie credible, and that their declarations accusing defendants in homicide cases are admissible as exceptions to the hearsay rule—a relaxation which owes more to superstition than to any sober study of the moribund.) So far as the Hearing Examiner knows, however, there has been only one attempt to obtain a judicial ruling on the validity of the criteria, but that ended abortively before the Court of Appeals because the question had not previously been raised in the proceeding before the Commission: *Florida Gulfcoast Broadcasters, Inc.* v. *FCC*, 352 F. 2d 726, 6 R.R. 2d 2001.

756. At the beginning of the Conclusions there was reference to Frazer's imaginative recreation of the plight of the pagan priest, terrified that he might be killed at any moment. As a citation it was undoubtedly outré, but the excuse for using it is that it illustrated the vulnerability of a sitting station despite such preference as it enjoys merely for having been. The incumbent is bound by the past; its competitors are free of the future. They can organize corporations for which the *Statement of Policy*, 5 R.R. 2d 1901, could almost serve as charter or bylaws, and they can make promises unfettered by a realization of bygone failures. They can canter briskly through preparatory campaigns and try to catch the eye of the Commission by means inappropriate to an existing station, which made its preparations long ago and now must rely on its operating record.

757. In a trenchant judgment which naturally it would have applied only to BBI, but which may be here adopted for its general pertinence, Charles River says (step III, proposed conclusions, p. 108):

> In a proceeding of any length, an applicant reveals a character which seems to pervade everything it does. Once this character is demonstrated, it is the best indicium available for predicting how the applicant would operate a broadcast facility should it be given the opportunity to do so.

758. Indicative of the extent to which BBI will go to impress the Commission in the comparison, according to Charles River, are, among other things: (*a*) an exaggerated integration proposal; (*b*) an

extravagant local live proposal; and (*c*) its impracticable proposed 24-hour operation.

759. It is not important at this point to note that Charles River is itself guilty of exaggeration in charging BBI with an unrealistic 100 percent integration proposal, when at full count (including Mr. Goodrich) the alleged integration or participation would cover only 20 of the 29 or 30 BBI principals and obviously less than 100 percent stock ownership. In a decision facile suspicion must be avoided as much as gullible acceptance. To call a proposal incredible may merely mean that one is attaching a common label to something which one chooses not to believe. BBI would have been foolish not to avail itself of the recognized ability and knowledge of its principals, for instance Professor Handlin's, Mr. Gardner's and Professor Bursk's. But less easy to pass over and generating a suspicion akin to, if not as corrosive as Charles River's are BBI's proposal for Mr. Steele as executive producer of a program though he has no experience in production; Mr. Huffman's inexperience in product clearance; the Jaffe organization participation as connected with syndication of Jaffe-produced programs; the uncertain nature of Mrs. West's functions, and her role with the executive team; and, however smoothly the two men might work together after a shakedown cruise, the confusing conferral of responsibilities on both Mr. David and Mr. Burdick. There has been no mention yet in this paragraph of the ability of men like Dr. Handlin to wrench 15 hours for the station from his already overcrowded work week, or of Dr. Knowles to find the 2 hours a week which he had evidently found it inadvisable to take from his hospital and writing work in the preparatory period, for it is a commonplace that the busier the man, the more he can still do, if he puts his mind to it; or that Dr. Beranek (10 hours a week) and Mr. Gardner (15) will still travel extensively. The upshot of these comments is that there is a doubt regarding BBI's motives in formulating the integration proposal—whether it was proposing an actual working arrangement or a superficially impressive plan of stockholder participation for comparative advantage. But the latter motive would not necessarily exclude the possibility of the plan's functioning, so that while skepticism, prompted largely by its assigning stockholders to posts apparently made for them, regardless of their suitability, regarding BBI's sincerity cannot be eradicated, it cannot result, as Charles River demands, in the complete discarding of BBI's integration proposal.

760. Charles River cogently writes (step III, proposed conclusions, p. 109):

> It is well-known that the Commission favors local live programing. [See, however, *Policy Statement on Comparative Broadcast Hearings*, 5 R.R. 2d at 1912: "We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred."] BBI, in keeping with its objective to impress the Commission, responded predictably. It proposed more local live programing than any operating network affiliate in the country, and as a consequence was able to come forth with an awesome list of preemptions. In spite of this, BBI did not bother to check with the network to determine whether it could maintain its affiliation with such a record of preemptions nor did it apparently want to go all the way and propose a completely independent operation.

761. BBI has proposed that 45.3 percent, or over 72 hours, of its 160.5 hours of weekly programing would be live local. (Charles River names this as the BBI local live percentage, forgetting, as BBI points out in step IV (p. 46) that 9 percent of the total of 45.3 percent are taped repeats; the true percentage total is thus reduced to 36.3 percent.) The central inquiry here is not whether the network would acquiesce in the preemptions necessary to accommodate the local programs—for it has been the Hearing Examiner's experience (admittedly limited on the subject) that it is almost impossible to learn from network officials their standards for the retention of an affiliation; but whether BBI established its ability to produce its extraordinary percentage of local live programs. Charles River cites *Veterans Broadcasting Co.*, 4 R.R. 2d 375, the Syracuse channel 9 comparative television Decision. One of the Syracuse applicants, Six Nations, said that 39.42 percent of its 135 hours a week, or over 7½ hours a day, would be local live. The Commission, passing on the Six Nations proposal, found, from an exhibit submitted by another applicant, based on Commission records, that the national average of local live programs for network-affiliated stations is 8.9 percent, and that only two exceed 25 percent (Cleveland, 28.5 percent, and Chicago, 27.8 percent), while only one independent station exceeds Six Nations' figure (KCOP–TV, Los Angeles, 46.6) and only three other independent stations exceed 25 percent (New York City, 37.9 percent; Los Angeles, 35.5 percent; and Denver, 34.3 percent), 4 R.R. 2d at 394. The Commission said:

> Six Nations' figure is nearly double the average of the percentages proposed by the other eight applicants, and it was properly rejected by the examiner as a basis of preference of Six Nations * * * In calling the figure "extravagant" and a "mere 'paper' proposal," the examiner pointed out that not one of the network-affiliated stations in this country has reported a percentage of local live programing anywhere near 39 percent * * * that Six Nations had failed "to point to any empirical data anywhere to support its promise in this area," and that the figure had been "advanced without any regard whatsoever to the practicality of accomplishment."
>
> The Commission agrees with the examiner that in submitting a proposal so inconsonant with what others are doing, it was incumbent upon Six Nations to dispel the inherent doubts as to its reasonableness and reliability. As to this burden, Six Nations has completely failed, and in the reams of material which it has submitted in this proceeding, there is nothing indicating that it gave any extended or serious consideration to such matters as the costs of the programs involved, the salability of local commercial shows, or the consistent availability of local talent * * * In these circumstances, Six Nations' program proposals, because so unrealistic, earn for that applicant a low ranking * * * under the overall program criteria.

762. BBI can only invoke brave generalities in its proposed conclusions in support of its claimed ability to carry out its local live proposals. It writes (step III, pp. 35–36):

> The record supports the conclusion that BBI's proposals are made in good faith, are feasible, and are in the public interest. Producing local live programing in substantial quantities is a question of money, staff, facilities and the will to get the job done. Boston, as the country's fifth largest market, offers the financial support, BBI proposes the necessary staff and facilities (BBI [step I] par. 225–28), and the character, background and experience of its principals are a testament to their will to carry out BBI's proposals * * *

In step IV (p. 46) BBI supplements its generalities:

> * * * BBI was of course well aware of the decision (Veterans) and also knew that what BBI was proposing had nothing in common with the rejected proposal of the applicant in that case. The quick answer to Charles River's argument is that Syracuse is not Boston, Six Nations Television Corp. is not BBI and the proposal of Six Nations that was criticized in the Syracuse case bears no similarity to the proposal of BBI in conception, development, planning and possibility of execution. Obviously, serious doubts were raised at the outset about the Six Nations proposal for over 39 percent local live programing in the country's 35th television market with an ARB total net weekly circulation of 466,800. The same doubts are not raised by BBI's plan for 36 percent in the 5th market with a circulation of 1,675,000 * * *

Charles River's comment may be quoted, however (step III, proposed conclusions, p. 111): "BBI has not introduced any evidence to indicate it gave 'serious' consideration to the problems which its extravagant proposal has in common with the Six Nations proposal." While WHDH's own sober 1962 renewal application composite week showing of 22 percent, or about 30 hours a week, does not in itself represent the peak of possible achievement for local live programing in Boston, the fact that BBI's proposal so far exceeds it intensifies the suspicion that BBI's figure, even at the 36.3 percent rate, much in excess of any network station and in the vicinity of the highest percentage for independent stations, was flashed for its supposed value in a comparison. BBI does not note that its 36.3 percent, applied to 160.5 hours a week, is about 58¼ hours, while the 39.42 percent of Six Nations, applied to its proposed 135 hours, totaled 52 hours. (Charles River proposes 28.5 percent local live, or about 36½ hours a week.)

763. The Hearing Examiner does not share Charles River's scoffing at the proposed BBI 24-hour operation for 5 days a week. He agrees with Charles River that the proposal was "calculated to impress the Commission" (step III, proposed conclusions, p. 113), but there is nothing wrong with this objective (see, however, next paragraphs) unless there was not also a sincere belief that the project could be accomplished. Though no Boston TV station now operates 24 hours a day, some Boston radio stations do, including WHDH (AM), and there is nothing about the extension of operating hours (except that it will infringe further upon the blessed hours of the night) so startling as to warrant its advance rejection. It is not significant that BBI's studies were allegedly inadequate to back up the feasibility of 24-hour operation. If Charles River's excessively cautious, disapproving view had influenced other stations' thoughts of lengthening their hours of operation, television would still be in the 5–11 p.m. stage.

764. The insufficiently supported local live proposal, the ingeniously devised but possibly practical integration proposal, and the proposed 24-hour operation, may differ in the likelihood of their execution, but Charles River's observation, quoted in paragraph 757, above, is apt, as there indicated. Perfection is undeniably a desirable goal, but in investing itself with attractive characteristics approaching the utmost of which an applicant could conceivably be capable without crossing over into fantasy, BBI has run the danger of branding its whole hearing presentation as a series of campaign maneuvers. It lies

open to the charge that its "art is too precise in every part." BBI complains (step IV, pp. 52–3), in effect, that it is a transvaluation of values to criticize it for being "too good to be true." If this had been the simplistic approach taken to its case, one would be taken aback by the complaint. But the essence of the present conclusion is not merely that BBI is so nearly perfect in so many areas, but that its claims are consistently on the edge of credibility, when it is realized that it is as yet only an untried applicant. Its disparagement of its rivals' claims is correspondingly solipsistic. Thus, it writes (step III, proposed conclusions, pp. 72–3): "The record makes it clear that whatever Jones' ideals may or may not have been for the operation of a television station in Boston, they were superseded by the powerful intervention of Cabot, whose primary, perhaps sole, interest was in devoting the profits of the proposed station to the support of education. The element of service to the community became therefore a secondary consideration. *This point is sharpened if Charles River's 'charity angle' is compared with BBI's announced intention to dedicate a large proportion of its potential profits to constant improvement of local programing* * * * *The desire which the possible availability of channel 5 stimulated in Charles River's principals to make a contingent offer of substantial support to education in the area should be contrasted with the action of BBI stockholders Lester and Alfred Morse, in 1960, in underwriting the establishment at Brandeis University of the Morse Communication Research Institute*" (emphasis supplied). (With all respect for the Morses' generous and admirably conceived gift, it might be noted that they were not so selfless as successfully to insist that the Institute be called by a name other than their own. The foundation and the applicant, however, are called Charles River, not Theodore Jones, or Thomas D. Cabot, or Ernest Henderson, for example.)

765. In its charges of pretentiousness levied against BBI, Charles River names the program surveys (under several categories). But because this subject involves both BBI and Charles River it will be discussed in a separate section immediately below.

766. *The surveys.* BBI and Charles River reacted with foreseeable zeal to the adjurations of the Suburban rule (it is realized that there was no special disqualifying issue on ascertainment of needs in their comparative case, but the rule's influence is not so limited. In Community, 25 R.R. 2035, 24 R.R. 1, 23, there was no special Suburban issue). They indulged in an apparent ecstasy of self-abasement to the Commission's mandate that they "consider the tastes, needs and desires of the public (they would be) licensed to serve," *Commission Policy on Programing*, 20 R.R. 1901, 1913; see *Suburban Broadcasters v. FCC*, 112 U.S. App. D.C. 257, 302 F. 2d 191, 23 R.R. 2016. (Whether the Suburban r[illegible] compels a self-abnegation incompatible with a licensee's function as a tastemaker is beyond the scope of this discussion, though, parenthetically, the Hearing Examiner may observe that he does not think it does.) At the present point it is only necessary to discuss the nature and claimed influences of the program surveys and their significance as elements in the comparison. Program survey evidence is a constituent of a comparative case as oxygen (or perhaps xenon, an inert gas) is of the atmosphere. Even WHDH, an operating

station, paid deference to the importance of a formalized ascertainment of public tastes by offering evidence about its program committee, a group which emerges bienially like a foxglove or the Internazionale d'Arte at Venice (par. 164, above).

767. Of the two applicants BBI made and has proposed the more elaborate, scientific, and mechanized methods of ascertaining mass wants and approbation. It is an impressive display, but chiefly in exemplifying the characteristic tendency of BBI to carry a Commission pronouncement to the extreme rather than in its possible adaptation to the true public interest. The findings of fact indicated the difficulty of determining whether the platitudes gleaned from the survey substantially influenced the program proposals; for all the record shows, the surveys of both BBI and Charles River were as productive of the result as a Hopi rain dance providentially followed by a shower. There is nothing to challenge the belief that by their own meditations and discussions, aided only by their knowledge of the area and their general acumen, the groups would have devised equally acceptable program schedules, and that outside attestations of their proposals were superfluous (see *Community Telecasting Corp.* v. *FCC*, 317 F. 2d 592, 25 R.R. 2035, cited above).

768. The misgiving remains that the surveys and related activities were here more a talking point for a comparative case than an indispensable factor in program preparation. As the Review Board said in *Higson-Frank Radio Enterprises*, 2 R.R. 2d 755, 767, "The Suburban issue is designed to determine whether the applicant has an earnest interest in serving the local community." It is not designed to enable applicants to score preference points off each other by bustling about more or by proposing instantaneous electronic analyses, unless it can be shown that the activity and paraphernalia are related to probable better programing. Multiple surveys and banks of computers will not produce a poignant drama, a subtle comedy, a bold discussion of a troublesome problem, or a clever pictorial essay.

769. A further obstacle to accepting survey answers as necessarily reflected in program proposals is the difficulty or properly interpreting the responses. While there would be little trouble with simple questions—though here it may fairly be asked why any public questioning on elementary points is necessary at all—the danger of the interviewer's interposing his own, possibly mistaken, construction of the replies obviously increases with the complexity of the subject. This may be illustrated by reference to paragraph 643, above (though the comment there was not in a formal survey, but at a meeting of the BBI Program Advisory Committee). Prof. I. A. Richards, a noted semanticist and author, and himself a poet, suggested, according to BBI's hearing exhibit, using "visual capabilities of television by showing poetry on the screen." In the exhibit (3–C, p. 23) this is followed by what may be described as Professor Richards' recommendation about silverware and automobiles, a banality from which, if his words were properly understood, one senses more than a whiff of patronizing. But on the more difficult topic of poetry, which, from his reputation is more Professor Richards' specialty than silverware or automobiles, was he suggesting something as simple as a rendition of "The High-

wayman" accompanied by moving pictures portraying the action? Or did his proposal involve an idea of great subtlety, perhaps hardly adapted to the medium, exemplified in the work of Yeats and Mallarmé? (See John Unterecker, "Second Childhood," Columbia University Forum, Summer 1965, p. 10, 14; and "Sono-montage" in The Listener of June 30, 1966, at p. 960, for an account of a radio "experiment in combining spoken poetry with electronically produced sounds," apparently so avant-garde that Professor Richards may not have had it in mind, but indicative of the complexity of his suggestion.) These questions on an esoteric subject are not asked superciliously, but to indicate the possibility of misconstruction when another person's thinking is interposed, as in this case, to interpret or narrate the gist of responses.

770. If WHDH's vantage as an existing station seeking renewal was lessened by the ability of its competitors to shape their own proposals, it was increased by the internecine hostility of BBI and Charles River, already mentioned.

771. After belaboring WHDH in its step III proposed conclusions, BBI writes (p. 60):

> 92. Charles River's limited integration proposal, tempered by Jones' equally limited expertise (as distinguished from length of broadcast experience) and by the demerit assessed to Jones for the past broadcast record of WCRB, qualifies it for only third place in the effectuation [D]erby, a position it earns at the expense of only Greater Boston, an habitual also-ran with no distinguishing credentials. (It was noted above, in par. 726, that at a later point BBI rated WHDH last overall.)

BBI takes off against Charles River on other points too. These will also be discussed.

772. Faced with the fact that all its stock will be held by the Charles River Civic Foundation, Charles River argues that its integration proposal should be judged in the light of its "somewhat unusual situation" (step III, proposed conclusions, p. 77). This it equates with the integration factors held sufficient in *Loyola University*, 12 R.R. 1017, 1109 (board of directors of nonprofit corporation); *city of Jacksonville*, 12 R.R. 113, 180r (city commissioners); *Triad Television Corp.*, 16 R.R. 501, 667–68 (State Board of Agriculture); and *Toledo Blade Company*, 15 R.R. 739, 816 (applicant "Citizens' officers and directors are also prominent officials of the labor organizations holding the greater portion of the stock in this applicant"). All stockholders of applicant Charles River are also at present trustees of Charles River Civic Foundation except Robert G. Stone (David B. Stone, a trustee, is not a Charles River stockholder). Charles River's stock will be voted by the foundation's trustees, with the majority of the trustees in office controlling the vote. BBI maintains (step III, proposed conclusions, p. 44) that "because of the planned ownership interposition of the foundation * * * there can be no integration whatsoever in Charles River." It cites *Florida Gulfcoast Broadcasters, Inc.*, 23 R.R. 1, 10–11, 4 R.R. 2d 1, affd. 352 F. 2d 726, 6 R.R. 2d 2001 (city council had no control over the station manager; council had little control over the city manager, who might have been considered an integrated principal but for the fact that he could "devote but a small portion of his time to overseeing the city's broadcast operations" and had

"delegated to the station manager the responsibility for decisions in the critical areas of advertising and programing" [23 R.R. at 11]; the station manager was held not a principal, 4 R.R. 2d at 14). It is concluded that the ability, in the abstract, of Charles River to claim integration, is affirmed by the cases it cites, the situations there being a persuasive approximation of its own situation, in which almost all Charles River stockholders are also trustees of the foundation. *Florida Gulfcoast*, cited by BBI, is clearly distinguishable. There was no power of direction by elected officials over the station manager; the city manager, who otherwise might have been regarded as an integrated principal, actually had little or no time for broadcast supervision; and the station manager had no conceivable ownership interest.

773. Charles River claims the benefit of its "meaningful" integration, as opposed to what it calls BBI's "spurious effort" (step III, proposed conclusions, p. 79), through the participation of Mr. Jones, president, director, member of the executive committee, trustee, and general manager of the station, "who has spent his adult work life in the broadcasting field, [and] will devote full time to the day-to-day operations of the station"; Mr. Saudek, vice president in charge of creative programing, "another principal [sic] who has been associated with the broadcasting industry throughout his adult work life, [who] will devote at least 2 days each week in Boston to his programing duties with the station"; Mr. Cabot, chairman of the board of directors, member of the executive committee, and trustee, who "will devote 15 hours weekly, and more if necessary, to financial and budgeting problems and will preside at meetings of the board of directors and of the executive committee"; Mr. Fuller, director, member of the executive committee, and trustee, who "will devote 20 hours per week to the business affairs of the Corporation reviewing financial operations and assisting in contract negotiations"; Mr. Cahners, director, member of the executive committee, and trustee, "who has been active in the publishing field, [and] will devote 5 to 10 hours each week to the station's public relations and will also assist Mr. Cabot and Mr. Fuller in handling financial affairs"; and Mrs. Perkins, director, member of the executive committee, and trustee, who "will devote at least 3 days each week to her duties involving liaison between the station's creative and production staff and the various organizations in the community whose cooperation will be necessary for the preparation of the station's community and public affairs programs." BBI contends, however: "Even if the insulating effect of the foundation were ignored, only the 4.9-percent interest of Jones * * * could be counted, since the plans for the operating activities of the other 'investors' are so vague as to preclude a finding that they are definitely slated to participate in day-to-day operations * * * even on a part-time basis."

774. Catch-all phrases—financial and budgeting problems, business affairs and reviewing financial operations, public relations and financial affairs—are not by themselves helpful in determining whether principals to be involved in these matters will participate significantly in the day-to-day operations. While it might be assumed

that Mr. Cabot (although no provision has been made for an office for him), because of his promotional role in the venture and his tepid opinion of Mr. Jones as a financier, will keep close tabs on the station's fiscal operations; and that use will be made of Mr. Fuller's vast experience in raising and handling money, even as to them there is no explanation why their duties will take 15 and 20 hours a week. Mr. Cabot admitted that he did not "expect to participate in the day-to-day operation of the station" (par. 248, above). As to Mr. Cahners and Mrs. Perkins, with a projected 5 to 10 hours and 3 days a week respectively, as noted in paragraphs 289 and 331 above, Mr. Jones has not even told them what their specific duties would be. In *Mrs. Perkins'* case there is record support to question whether Mr. Jones knows just what she is expected to do, for he testified (see par. 331): "I will tell her what her duties are when I think it is proper to put them in that kind of frame."

775. Mr. Jones will be a full-time corporate official and general manager of the station. But Mr. Saudek, no matter how sharply his proposed duties, which would take at least 2 days a week, were delineated, could not count as a principal for integration, as he has no ownership interest even in Charles River, the applicant.

776. As it says, Charles River was more modest than BBI in demanding credit for integration. But except for Mr. Jones (and overlooking the unjustified claim for Mr. Saudek) it was too reticent to make its integration proposal as meaningful as it had undoubtedly hoped.

777. Contrasting the asserted expertise of its own principals with that of others, including Mr. Jones, BBI says (step III, proposed conclusions, p. 53):

> **BBI, with stockholders Burdick, Pickard, Jaffe, Neuman and Wood all experienced in television production, Beranek trained in electrical engineering, acoustics, and studio design, David well-schooled in the field of communications regulation * * * Gardner outstanding in film production * * * Bursk, Handlin and Knowles all with useful experience in television * * * and Mrs. West with considerable experience in AM broadcasting * * * is therefore well ahead on this issue [Broadcast Experience criterion]. To the degree that the persons are integrated * * * and to the extent that they are local residents * * * their television experience must be given added weight (citing *Policy Statement*, 5 R.R. 2d at 1910).**

Mr. Jones' experience, as BBI points out (step III, proposed conclusions, p. 52) has been limited to radio. This experience of over 20 years cannot be ignored, however, nor is its significance materially diminished merely because over the years Mr. Jones did not achieve omniscience (see par. 382, above), an attribute BBI by implication would attach to its principals in their fields.

778. Mr. Jones' experience with WCRB, however, has not necessarily schooled him for the operation of a station with a less specialized format. WCRB is preeminently a good music station—and its record in its specialty is excellent—with considerable news and some other nonmusical programs. It is and thinks of itself as a regional station, but pays some attention to Waltham, its location. As might have been expected, WCRB's history has not been free of logging blunders, and BBI, fortunate in not itself owning a station, smelled

blood and has rushed in for the kill. But here WCRB is entitled to the same tolerance shown WHDH. BBI has unearthed one dereliction which might be charged, though lightly because of the context in which the discrimination occurs, against WCRB and Mr. Jones. The station gives free, or courtesy announcements to commercial program and spot buyers, but does not grant the same premium for political spots. This is contrary to section 315(b) of the Communications Act, which reads:

> The charges made for the use of any broadcasting station for any of the purposes set forth in this section [political broadcasts] shall not exceed the charges made for comparable use of such station for other purposes.

Commission rules 73.120(c) (AM) and 73.290(c) (FM) are based on this section of the act. They provide in part:

> All discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office.

There will be no courtesy spots on the Charles River television station.

779. More amusing as an illustration of the art of advocacy than pertinent as a criticism of Charles River's proposal is BBI's statement at page 52–3 of its step III proposed conclusions. Apparently unable to find fault with Mr. Saudek's distinguished television production experience, let alone say anything favorable about it, BBI shifts its ground and writes: "Saudek, though proposing to spend 2 days a week [at least 2 days a week were proposed] at the station, will remain a resident of New York." How his New York residence will affect his performance while at the station is not explained. Charles River pointedly comments (step IV, reply, p. 16): "However, in keeping with its one-sided approach to the record, BBI has no difficulty in overlooking the fact that Messrs. Wood, Jaffe and Neuman propose to devote only 5 hours per week to their consulting duties for BBI while remaining residents of cities other than Boston."

780. Much is made of Mr. Jones' conduct in the Paine affair. He is charged with (*a*) somnolence and naiveté, at least, in not learning of Mr. Paine's background earlier; and (*b*) tardy disclosure of the facts to the Commission when he did learn of them in late 1962, though in the meantime WCRB had filed a renewal application which may have been the first application not signed by Mr. Jones as a corporate officer. When the renewal application was filed, Mr. Jones knew that BBI principals knew about Mr. Paine. Not until about 4 months after he unquestionably heard of Mr. Paine's record, however, did Mr. Jones tell the Commission about it.

781. As written in the findings of fact (par. 365, above), the confusion about the preparation of the original application for WCRB authorization was not cleared up by Mr. Jones' testimony. Whether he was deliberately vague in order to balk an inquiry baring his possible actual knowledge of the facts, however, is only speculative. The implications of his months-long silence after he knew of Mr. Paine's involvement are equivocal. On the one hand, he was aware of BBI's knowledge of the facts, so that credence is lent his testimony that he had asked Mr. Paine for an explanation and had been told by him that he had legal advice that the Presidential pardon made "No" an appro-

priate answer. On the other, the fact that Mr. Jones did not sign the WCRB December 1962, renewal application makes it reasonable to suppose that there were some doubts in his mind about the propriety of "No" in spite of the pardon, and that to be on the safe side, as he thought, he had left his signature off the document. (In its step IV reply (p. 20) Charles River contends: "The claim that the renewal application filed in 1962 by WCRB was the first WCRB application signed by an officer of the licensee other than Mr. Jones (even if correct, which it is not) [Charles River, however, submits no supporting particulars] is meaningless. Renewal applications do not request information concerning prior convictions." The inferences here drawn from Mr. Jones not signing the renewal application can, of course, only be a casting about among possibilities, but they are not affected by the fact that the renewal application form does not call for the information. Indeed, there was all the more reason then for Mr. Jones to sign the application.) Without doubt, the proper course would have been immediately to give all the facts to the Commission to let it draw its own conclusion; and indeed, after Mr. Jones got legal advice, this was done in an appropriate application. The record, however, is not sufficient to permit ascribing to Mr. Jones more than (as with WHDH) misconstruction of his responsibilities.

782. In paragraph 383 of the findings of fact there is a short account of Mr. Jones' idiosyncrasies in testifying. From that recital it is easier to say that they were irritating than to conclude that Mr. Jones displayed a lack of candor, as BBI would have it, to the point that Charles River is chargeable with a comparative demerit. None is assessed.

783. In writing that exaggeration pervades BBI's case, Charles River forgets, or is not aware, that its own is not free of this sin of litigation. Two instances may be mentioned. (*a*) In the findings of fact, paragraph 445, it was noted that in an exhibit Charles River said: "The plays we will want to produce fully will be drawn from such a list as this: Strindberg, 'The Father'; O'Neill, 'Emperor Jones'; Buchner [Berg] 'Wozzeck'; Beckett, 'Happy Days'; Osborne, 'Epitaph for George Dillon'; Sheridan, 'The Critic'; Shaw, 'Arms and the Man'; Albee, 'The American Dream'." Naturally, the plays it produces will be drawn from a list which could include these plays and a thousand more, like Lope de Vega (hundreds), Calderon, "Life Is a Dream", Molière, "Tartuffe", Hauptmann, "The Weavers". Adding them in this fashion would have made the list even more imposing, but the plays actually to be put on the air are unspecified. The suspicion that there was name-dropping is enhanced when one sees cited Albee's, "The American Dream". The Hearing Examiner wondered aloud during the hearing if Charles River would produce that drama in a reasonably uncut version; Mr. Jones conceded it would be cut if shown. (*b*) Apparently overcome by its desire to impress with the catholicity of its college focus program (par. 455, above), Charles River says that it could, among other things, feature an anatomy class from a medical school. In paragraph 455 the Hearing Examiner inserted an exclamation point as a shorthand symbol of his reaction, and as an expression of his amazement that Charles River was with evident seriousness pro-

jecting the program. It would be too easy to burlesque a scenario for an anatomy class production, or to suggest programs of even greater macabre interest, so a decent reserve will be here maintained. Because the tendency to claim programs as educational for what is thought to be the greater prestige of the term is not confined to Charles River, its assumption of the label in the case of BSO programs (par. 447, above) (which, as there explained, has no relation to the value of the programs) is mentioned again only in passing, and not to supplement the instances in this paragraph.

784. Another revealing aspect of Charles River's case, however, should not be brushed aside. It may perhaps best be summarized in the following excerpt from BBI's step III brief, pp. 9–10:

> Attention is called to an interesting descending spiral of positions with reference to the "charity angle." Thomas Cabot frankly stated that he expected Charles River's eleemosynary goals would help it prevail before the Commission [see par. 409, above]. Its counsel, however, in the light of events at the hearing, has disclaimed any intention of relying on charity as a point of preference. [BBI goes on to urge "that the inevitable sapping of vitality from the projected program service because of the 'charity angle' requires that Charles River be penalized by a demerit"; this point is briefly noted again below.] * * *

785. The Hearing Examiner has not thought it worthwhile to pit the principals of BBI and Charles River head-to-head over area familiarity (local residence and civic activity). There are, no doubt, differences in the variety and intensity of civic participation, as BBI (step III, proposed conclusions, pp. 49 ff.) has not been slow to argue, forgetting, as Charles River points out in its step IV reply (p. 15), that six of its principals—Messrs. Beranek, Pickard, Burdick, Neuman, Wood, and David (if not all in the utter degree alleged by Charles River) have shown little civic interest. Charles River also contests BBI's assumption of equality with it in residence in the Boston area, writing (step IV reply, p. 15): "Charles River's principals with the exception of Mr. Saudek are all long-term residents of the Greater Boston area. Messrs. Burdick [who will move there] Pickard [who lived there recently for 3½ years and as a boy lived for 4 years in Fitchburg, Mass.] and David [who lived in the Boston area from his birth in 1913 until 1929, and returned there in 1962] of BBI's seven-man management team [one up from Charles River's count in step II, p. 99] and Messrs. Wood, Jaffe and Neuman are not." Whatever the differences in local residence and activity among individual principals of BBI and Charles River, however, it is fair to say that in the main they are composed of active local residents, and no distinction is drawn between them in respect of area familiarity.

786. The proposed schedules of either Charles River or BBI, as attractively described in their exhibits on local offerings, would, if produced, give the community a diversity of excellent programs. As a result of the generalized description in its proposed findings, followed in the findings of fact, the WHDH presentation, judged by its narrative interest, suffers by comparison; only a few WHDH programs were portrayed in the detail employed by BBI and Charles River. (The explanation of the difference is simple, however. New applicants enjoy a literary advantage [unless the station limits itself to a composite week]

because it is much easier to describe what are tantamount to samples of proposed programs than to tell, in reasonable space, about the thousands of produced programs of the operating station.) While the type breakdown of all the applicants, as they have made it, shows a program variety within acceptable bounds of individual licensee or applicant discretion, it is again a matter of some note that BBI, with characteristic magniloquence, claims only 53.3 percent entertainment (as if in itself entertainment is less desirable than other categories) against 62 percent for Charles River's proposal and 68.1 percent for WHDH's 1962 application composite week. The last two figures, as previously explained, are subject to upward revision. The BSO concerts, which Charles River proposes as a regular feature with reasonable assurance that they will be carried, but which may be only an occasional special under BBI's proposal, account for the underestimation of Charles River's entertainment (par. 447, above); and WHDH's analyzed entertainment percentage may also be too small (pars. 154 and 158). There should be no need to stress again, however, that program value is not governed by nomenclature.

787. *Summation.* As an existing station asking renewal was competing against three groups seeking an initial license, the Hearing Examiner decided that the traditional mode of comparing mutually exclusive applicants, in the mechanical or point-by-point manner especially advocated by BBI, would have been a sterile exercise. The cardinal probative attribute—for good or bad—of the incumbent was its operating record. The absurdity of judging an applicant for renewal by its conformity with the classical criteria pertinent in an all-newcomer contest is patent if one posits a case of two existing stations in the same city competing for a third channel there on condition the winner abandon his present channel. Applicant A is 100 percent locally owned by civic livewires with vast broadcast experience, and completely management-ownership integrated (media diversification is being disregarded since the discussion has not reached that criterion), but with an operating record of unexampled meretriciousness which it promises to continue. Applicant B is 100 percent absentee-owned, run by a hired staff without ownership interests, but with an excellent operating record it proposes to maintain. Clearly, as this paper conflict is posed, there is no contest. B should win hands down unless one overemphasizes the significance of the classical indices. In the present case WHDH should have cashed in its chips and gone home before the game started if it were forced to depend on its conformity to the traditional standards for preference. Its integration is small. Only if its long identification with the community through newspaper and station operation were regarded as a near-substitute for local ownership because it has enabled the applicant to acquire a knowledge of the community, could it claw a foothold. Facing the cleverly designed organizations and preparatory campaigns of locally-owned, civically active opponents, each integrated to a different degree but more than it is, and proposing managerial direction by fairly experienced persons, WHDH's prognosis would be poor unless it could rely for a clincher on its operating record unabated by any substantial character or other defects.

788. By the method here followed it is believed that all the appli-

cants were given the fullest opportunity to display their advantages. WHDH's operating record on the channel in issue, and the possibility of its continuance, were evaluated together with the proposals of the other applicants. Theirs are as yet only a hope and a promise, and estimates of the probability of their effectuation depend on characteristics which bear only a circumstantial relationship to them. It has already been explained that in the process adopted it was not intended that WHDH start off with a built-in lead, but that it was impossible to deny it the benefit of whatever superior persuasiveness its status as an existing station lends it.

789. It is hoped that the chief defect of WHDH's operating record has not been scanted in this initial decision. But if there is inadequacy—an unwillingness to grasp the nettle of some local problems—as a whole its record is favorable. Employing an experienced, veteran, and loyal staff, and with a management that has weathered at least one determined attack and may reasonably be expected to remain in control, so that the maintenance of its present record may be predicted, WHDH can withstand the claims of its competitors. The Hearing Examiner has not allowed himself to be unduly influenced by the ferocity of the attack on the character of WHDH. The Choate ex parte contacts episode has, it is hoped, been entombed with fitting funerary remarks. WHDH's reporting lapses have been considered and found not to be a significant comparative factor; and in the circumstances variations between program promise and performance were held not significant. Mr. Akerson's alleged testimonial discrepancies, and his and the directors' failure to express repugnance toward Mr. Choate's conduct, have been weighed and it was concluded that WHDH's standing was not affected. Mr. Garfinkle, pictured by Charles River and BBI as a malign figure whose Herald-Traveler stock ownership portends no good to the community, has been scaled down to a practical ineffectiveness.

790. The BBI and Charles River presentations are flawed in the respects described above. Admirable, even starstudded as BBI's locally-owned and civically-active group is, its promises are permeated by an exuberance which makes one doubtful of their fulfillment. BBI's program schedule, interestingly described and on its face adapted to the community's needs, contains so large a proportion of local live programs that, as BBI made its case, it cannot be confidently predicted that that applicant will produce them. Its integration and principal participation plan has not been critized on the ground that it is impossible but because it is proclaimed at the same high pitch as other parts of BBI's case. Nor is there anything impracticable about the 24-hour operation. Praiseworthy in itself, it is here mentioned together with the other matters because it is of a piece with them in its extremism, and helps to brand BBI's presentation.

791. The luminosity of the Charles River group is of about the same order of magnitude as BBI's. Its principals, (except Mr. Saudek), like most of BBI's, are locally resident and prominent. It proposes an excellent program schedule, though its charitable foundation stock ownership may have some impact on its service. A measure of its access to local program sources is its ability, because of the friendly relations of Mr. Jones and others of its principals with the

Boston Symphony Orchestra, to propose to carry BSO concerts regularly; the ability of the other applicants to broadcast the concerts, if they should want to do so (only BBI has explored the possibility of broadcasting them) would be derivative. Yet Charles River has not been able to sustain its pretensions under one of the favored criteria of the policy statement, there called "of substantial importance"—integration, or "participation in station management by owners," 5 R.R. 2d at 1909. Mr. Jones' full-time integration is conceded, and for at least 2 days a week he would have the experienced help of Mr. Saudek. But the participation of other principals in day-to-day operation, on which Charles River relies for its claim of meaningful integration, is so uncertain, as noted in paragraph 774, above, that Charles River is entitled to little or no credit for it. Nor is credit "given * * * the local residence * * * of any person who will not put his knowledge of the community (or area) * * * to any use in the operation of the station," *Policy Statement*, 5 R.R. at 1911. Forgotten are the assaults on Mr. Jones' testimony, the delayed Paine reporting, and the violation of section 315 so acutely described by BBI. Nevertheless, the Charles River case is infected—though not to the same degree as BBI's—with the endemic taint of comparative applicants, exaggerated advancement of its claims (see par. 783, above).

792. It is not believed necessary to supplement the foregoing summation with discussion of other matters like the Suburban rule, already covered in the conclusions. Their pertinence to the applicants' case is, it is hoped, already apparent. It is further believed that this summation is sufficient to demonstate, before consideration of media diversification, of the superiority of WHDH's claims to renewal against those of its competitors for initial license. WHDH's rest on a basis of achievement, theirs on promises, often glittering, but of relatively uncertain and unestablished validity.

793. In paragraph 717, above, it was written that Greater Boston II's comparative case would be considered even though it had not passed its two qualifying tests. After casting about for a form, the hearing examiner feels that he should not try to improve on the comments in BBI's step III brief, p. 11, and they are here adopted without necessary approval of the rhetoric:

> **The descriptive word or Greater Boston [II] is "tired." It too has ardent desires for a television license which its principals have sought for years. But somewhere along the trail any zest they may have had for service to the community waned. Now, like old soldiers, they are preoccupied with old skirmishes won or lost more than with the current fray. They long for the good old days when the planning of a television operation and a television schedule seemed to them relatively simple and uncomplicated.**
>
> **Their interest in television may have been long but so far as this record reflects, it has never been deep. Indeed, their concern has been so shallow that they could not work up the enthusiasm to make any recent study of the community's needs and resources. Because this failure runs afoul of the Commission's basic requirements, as enunciated in its 1960 programing statement, Greater Boston [II] has failed to establish its basic qualifications. On any comparative basis except possibly longevity, Greater Boston [II] cannot prevail. Its application is a shadowy document, thinly supported at the hearing by vague descriptions of ghostly figures, with one or two partially developed program ideas barely discernible in the mists. The only rational explanation of Greater Boston's application and its approach to the proceeding is that it has hoped to win, not on its own strength, but because of Herald-Traveler's weaknesses * * *.**

794. *Diversification of control of the media of mass communications.* In its *Policy Statement*, 5 R.R. 2d at 1908, the Commission said:

> We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and second, a maxium diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities * * * Equally basic is a broadcast service which meets the needs of the public in the areas to be served, both in terms of the general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility and independence to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.
>
> * * * * * * *

* * * Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective of the licensing scheme.

795. It is interesting to speculate whether, had all the applications been for initial license, the other media interests of WHDH (in Boston newspapers, AM, FM, and possibly now to be considered also, CATV elsewhere) would have weighed against it in the comparison complex to the point of destroying its chance of winning. In the 1957 first decision (*WHDH, Inc.*, 13 R.R. at 581), WHDH was being compared with other applicants who "have connections in various degrees with other media of mass communication"; the Commission said that diversification "remains, however, a comparative, not a disqualifying factor." In the September 1962, decision, where WHDH and Greater Boston I were compared, Greater Boston I was "not disassociated from communications media in the area," 24 R.R. at 260, and the Commission, affirming its conclusion in the 1957 decision, held that Greater Boston (I) is entitled to a substantial preference in this area. It added:

> However, the ultimate significance of this preference is diluted by the presence in the community of very extensive numbers of newspapers, as well as AM, FM, and television stations unassociated with the applicants. The Commission's policy of fostering diversified ownership of mass media of communication stems from the belief that the widest possible dissemination of information from diverse and competing sources bests serves the public interest. Manifestly, the weight to be accorded this policy in any given case must take into account the competitive situation in the community involved. Where, as here, the proposal is for a community already served by numerous diversely owned outlets of expression, a grant to an entity controlling a minor fraction of such outlets has less tendency to bring about the concentration of media control which the Commission's diversification policy is designed to avoid.

796. But in the present case BBI is virtually free of any media alliance (Greater Boston II is entirely free), and Charles River's is trivial by comparison locally and only tenuously suggested nationally. Yet even in all initial license cases the Commission has not given lack of diversification disqualifying significance (see above quotation from *WHDH, Inc.*, 13 R.R. at 581; and see *Diversification and the Public Interest: Administrative Policy of the FCC*, 66 Yale Law Journal 365 (1957), critical of the Commission's policy). In cases of a

renewing applicant opposed by newcomers, absence of diversification has been even less of a comparative factor in Commission precedents (see 66 Yale Law Journal at 379).

797. It is possible, or even probable, that in an all-initial license case the Hearing Examiner would have held that the concentration of ownership in WHDH (Herald-Traveler) of Boston newspaper and broadcast facilities was dispositive; and that whatever the shortcomings of the other applicants, their relative significance would be completely altered. But taking into account the nature of the proceeding (renewal-initial authorization), and the other communication facilities in the area described in the Commission's 1962 decision and in paragraphs 176–77 above, it is concluded that the preference for WHDH is not materially affected. As already noted, the Commission on reconsideration, 1 FCC 2d 1597, 1598, ruled that the *Policy Statement*, 5 R.R. 2d 1901, will apply to a case like this one, but it has not decided whether greater emphasis will be placed upon the demands of diversification in such a case than formerly. The Hearing Examiner feels that he should not try to anticipate a revised ruling by the Commission on the subject, even in a 4-months' license situation.

798. In the findings of fact (pars. 63, 75, and 76), there was reference to Greater Boston Distributors' business of distributing publications in the Boston area; to Mr. Garfinkle's stature in national distribution; to his highhanded dealing with the New York Times; and to the involvement of his company, the country's largest retail newsstand operator, in an FTC discrimination proceeding in which a cease and desist order was upheld by the United States Court of Appeals for the Second Circuit. These matters, relating to minority stockholders of Herald-Traveler (or a minority stockholder) cannot add to whatever burden WHDH bears under the diversification criterion.

799. It is, for its opponents, a fruitful task to comb through the back issues of a newspaper to bring to light alleged instances of its failure to conform to an ideal of public duty. Whatever they could adduce has been set out in the findings of fact (see pars. 181 ff.). It is believed from the discussion there that the instances recited are also insufficient to intensify whatever prejudice WHDH should suffer merely for the fact of its connection with a newspaper. In its step III proposed findings WHDH writes:

> The contention that "mutual promotion" exists in the Herald-Traveler's news feature columns rests upon a single newspaper story which was run as a news feature in the Sunday Herald [par. 182, above]. It is the only illustration that Charles River could find to support its claim, notwithstanding that it had available to it hundreds of issues of the newspaper and it had obviously made a serious study and had, in fact, researched the matter in depth.

800. Some final comments may be in order. It would have swelled this initial decision beyond its present outsize had every argument of the parties been expressly considered in the main body of the conclusions. A few illustrations will be sufficient. (*a*) It was not thought important enough to comment previously on BBI's warning (step III, brief, p. 7) that "such considerations on account of losses suffered by the imposition of sanctions need on this occasion elicit no solicitude." All that need be said now is that in the writing of this initial decision

undue sympathy—or pity—was repressed; and that decisional account was not taken of the fact that WHDH risked its money in an earlier TV age, or that Charles River and BBI are latecomers in the field. (*b*) WHDH tried to make something of its contention (see step IV, brief, p. C–4) that "BBI and Charles River both claim that they considered the Commission's September 1962, decision as an invitation for newcomers to file competing applications against the renewal application of WHDH," whereas in fact neither was in a position to file an application before the renewal-action deadline and were enabled to file only by the sure period extension. The argument was passed by. (*c*) (There was some reference to this point previously, but it may be repeated in different form.) The initial decision obviously did not fall in with BBI's almost totemic adherence to the persuasiveness of its compliance with the criteria against the claims of WHDH on its past record.

801. The Hearing Examiner has considered the reply brief which BBI asked, in its "motion for leave to file reply brief," filed August 3, to have accepted. It has not induced him to change his conclusions. Instances in which an identifiable entity within which control lies loses its status by a small stock transfer are different from one in which the stock transfer is from a member or members of one amorphous group to another or others belonging to a similarly nondescript agglomeration. If *KWIK*, 6 R.R. 576 (1951), cited by BBI (reply brief, p. 4) ever was a precedent against WHDH here, it has lost its force after passage of the 1952 amendment, which added the provision that the "application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question." Under BBI's interpretation, every time a single share of stock of a publicly held corporation is sold a "transfer of control" could be effected, depending on an arbitrary demarcation between the transferor and transferee groups. It must be recognized that a publicly held corporation is sui generis, and that its transactions cannot be decided by torturing form illustrations to fit a situation for which they were not designed.

ORDER

802. Accordingly, and because public interest, convenience, and necessity will be served, *It is ordered*, this 10th day of August 1966, that unless an appeal from this initial decision is taken to the Commission by a party or the Commission reviews the initial decision on its own motion in accordance with the provisions of section 1.276 of the rules, that:

(*a*) BBI's motion for leave to file reply brief, filed August 3, 1966, *Is granted*, and the reply brief *Is accepted.*

(*b*) The Commission's decision of September 25, 1962, in dockets Nos. 8739 and 11070 *Should not be modified.*

(*c*) The applicaton of WHDH, Inc., for renewal of license for its commercial television station WHDH–TV, operating on channel 5, Boston, Mass. (docket No. 15204; file No. BRCT–530), *Is granted* for the regular period; and that the applications for construction permits for the same facilities of Charles River Civic Television, Inc. (docket No. 15205, file No. BPCT–3164); Boston Broadcasters, Inc. (docket

No. 15206, file No. BPCT-3170); and Greater Boston TV Co., Inc. (docket No. 15207, file No. BPCT-3171) *Are denied.*

APPENDIX A

Paragraphs 20, 27, and 73 of the conclusions in the Commission's decision of April 25, 1957, in docket No. 8739:

20. The experience of WHDH is a composite of the directorial experience gained by several of its principals—Messrs. Choate, Talmadge, Wood, and O'Connell—as members of the board of WHDH, or its predecessor corporations, in supervising established policies for the radio station WHDH; special executive experience gained by Mr. Choate over these same years as the liaison officer between the board of directors of Herald-Traveler and its broadcast operations (WHDH); and the impressive experience, evolving in degree, gained by Mr. McGrath, vice president and director of the applicant in the standard broadcast field. It will be noted, and account is taken of the fact, that the experience shown by this applicant traces to aural broadcasting rather than to visual broadcasting, with the exception of a limited participation on the part of Mr. McGrath in television activities during his term with a New York radio station. Mr. McGrath has received various awards in broadcasting as shown by the findings, and was the first president of the Radio Executive Club of New England, has been a member of the board of directors of the National Association of Radio and Television Broadcasters, and is now a member of two of the committees of that association as well as of the board of directors of the Broadcast Advertising Bureau.

* * * * * * *

27. Mr. Winslow, Jr., who votes all of the stock in the applicant (owned by Herald-Traveler) will not be integrated into the management phases of the WHDH applicant. Mr. Choate, president and a director of the applicant, as well as vice president and a director of Herald-Traveler will be the focal point between the Herald-Traveler and the management of the applicant. He will be in frequent contact with the general manager of the applicant, Mr. McGrath, particularly on any matters involving policy, the details of which appear in the findings, both as regards the board of directors of the applicant and as regards the Herald-Traveler itself. Mr. Choate has performed this role with respect to the radio operation of WHDH for some years. As has been seen he has experience in broadcasting as an executive of WHDH and he has a distinguished civic record.

* * * * * * *

73. The factor of diversification of the media of mass communications weighs significantly against WHDH, as it does against DuMont though in moderate less degree. It is the view of the Commission that the difference between DuMont and WHDH in this factor is not sufficient to overcome the more favored position of WHDH in other respects. The question remains whether the inferior position of WHDH on the factor of diversification is of controlling weight as to Greater Boston and MBT when assessed against the superiority of WHDH with particular reference to past performance record and broadcast experience of principals. The overall strength of showing by WHDH, including the local factors, the program proposals, and the assurance of effectuation which is gathered from its superior broadcasting record over a period of years in the community concerned and the experience qualifications which its principals demonstrate, persuade the Commission that this applicant is the most qualified to provide programing service on a continuing basis in the interests of the population of the coverage area, notwithstanding that the diversification policy of the Commission would be better served by a grant to either Greater Boston or MBT. We believe that from the demonstrated superiority of the service to be expected from WHDH, greater public benefit would flow than would come from the application of our diversification policy in order to effect a grant to one of its competitors. For these reasons, it is our judgment that the public interest, conven-

lence and necessity will be best served by an award in this proceeding of a permit to construct a commercial television station on channel 5 in Boston to WHDH.

Paragraphs 4 and 8 of the conclusions of the Commission's decision of July 16, 1960 in docket No. 8739:

4. No other contacts were made on behalf of WHDH[10], and on such evidence we do not hold the grant to be void ab initio. Mr. McConnaughey did not even recall the first meeting and he refused to accept or read the brief tendered by Choate at the second luncheon. Under such circumstances it would be unrealistic to conclude that he was influenced by Choate's contacts or that the grant was actually secured as a result of improper activities.

* * * * * * *

8. It follows that we must now determine our ultimate disposition of the construction permit for channel 5 in Boston, and the role, if any, WHDH should play in such disposition. There is no question that the attempted pattern of influence disclosed on this record reflects adversely on WHDH, but we do not believe in light of all the circumstances that the public interest would be best served by the disqualification of that applicant. Mr. Choate is not guilty of offering any material inducement to influence the outcome of the proceeding or of actually arguing the merits of the case ex parte, but rather of attempting to establish a personal relationship with a member of the Commission with the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of WHDH in the event of a close decision and of attempting to present to a member of the Commission ex parte a legal brief on a matter so intimately concerned with the then pending hearing that he must have been aware of the applicability of the general problem discussed therein to the specific issue at stake in the Boston hearing. Such conduct, while reflecting adversely on WHDH and weakening its comparative position vis-a-vis its competitors in the proceeding, does not demonstrate such a complete lack of character as to require absolute disqualification.

* * * * * * *

Paragraphs 4, 13, and 14 of the Commission's decision of September 26, 1962 in docket No. 8739:

4. The Commission's decisions of April 25, 1957, and July 14, 1960, reached certain findings of fact and basic conclusions. The Commission, after studying the briefs filed by the parties and the oral argument of October 16, 1961, has evaluated the evidence in the two records; it is concluded from this examination that the basic findings and conclusions in the original decision require modification in very limited areas only, as hereinafter indicated. Those findings and conclusions which are not modified are readopted by the Commission.[4]

* * * * * * *

13. In the area of broadcast experience, WHDH has gained a substantial preference. When this preference is coupled with a meritorious past broadcast record, and a preference on the factor of integration of ownership with management, as has been displayed by WHDH, its decisional significance is considerable, for these factors are indicators of an applicant's ability to successfully implement its proposals and conduct a continuing operation in the public interest.

* * * * * * *

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[10] We do not deem the sending of a routine letter by a member of Congress without urging any favoritism of the Commission as being of sufficient materiality to warrant discussion in these conclusions.

[4] See opinion referred to in footnote, supra, in which the Commission declined to hold, in effect, that the only question to be decided here is whether the conclusions adverse to WHDH in the July 14, 1960 decision were sufficient to offset the conclusions favorable to WHDH in the April 24, 1957 decision. [Footnote 3, supra, states as follows: "In an opinion released July 20, 1961 (FCC 61-925) 20 R.R. 410g, the Commission rejected a WHDH petition to modify this procedure in various respects."]

16. In summary, both applicants have made strong showings on the local factors and in the areas of proposed programing and the physical facilities with which to effectuate their proposals. The difference between them on these criteria are too slight to afford the basis for a choice. It is apparent that the ultimate selection lies, as it lay in the Commission's deliberations preceding the 1957 decision, between the preference accorded WHDH in the areas of past broadcast experience and record and that accorded Greater Boston on the factor of diversification of mass media of communications. We believe that the public interest would be better served by a grant to WHDH, for the factors on which it has been preferred demonstrate a likelihood of a continuing operation in the public interest, while the factor on which Greater Boston has demonstrated superiority although concerned with an important Commission policy, is of greatly diminished significance in the circumstances of this case.

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3. FCC Memorandum Opinion and Order Adopted May 19, 1969, Released May 20, 1969 (17 FCC 2d 856)

F.C.C. 69-543

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WHDH, INC., BOSTON, MASS.	Docket No. 8739 File No. BPCT-248
GREATER BOSTON TELEVISION CORP., BOSTON, MASS.	Docket No. 11070 File No. BPCT-1657
For Construction Permits for New Television Stations (Channel 5)	
In re Applications of WHDH, INC. (WHDH-TV), BOSTON, MASS.	Docket No. 15204 File No. BRCT-530
For Renewal of License	
CHARLES RIVER CIVIC TELEVISION, INC., BOSTON, MASS.	Docket No. 15205 File No. BPCT-3164
BOSTON BROADCASTERS, INC., BOSTON, MASS.	Docket No. 15206 File No. BPCT-3170
GREATER BOSTON TV CO., INC., BOSTON, MASS.	Docket No. 15207 File No. BPCT-3171
For Construction Permits for New VHF Television Broadcast Stations	

MEMORANDUM OPINION AND ORDER

(Adopted May 19, 1969)

COMMISSIONER BARTLEY FOR THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN; COX, AND H. REX LEE NOT PARTICIPATING; COMMISSIONER ROBERT E. LEE DISSENTING.

1. Several petitions for rehearing and other relief, relating to our decision herein which was released on January 23, 1969 (16 F.C.C. 2d 1, 15 R.R. 2d 411), are before us for consideration.[1] Briefly stated, we granted in that decision the application of Boston Broadcasters, Inc. (BBI) for a construction permit for a new television broadcast station to operate on channel 5 in Boston, Mass. At the same time, we denied the application of WHDH, Inc. (WHDH) for renewal of its license to operate its station on channel 5, and we denied competing applications for the same facility which were filed by Charles River Civic Television, Inc. (Charles River) and Greater Boston TV Co., Inc. (Greater Boston II). We specified no date for termination of the operation of station WHDH-TV inasmuch as the U.S. Court of Appeals for the District of Columbia Circuit retained jurisdiction when it remanded the case for further proceedings consistent with its opinion in *Greater Boston Television Corp.* v. *Fed-*

[1] The pleadings are listed in app. A which is attached hereto.

eral Communications Commission, 344 F. 2d 552, 2 R.R. 2d 2040. In addition, we directed our General Counsel to report these proceedings and our decision forthwith to that court.

I. The WHDH Petition for Rehearing

2. Since we considered the WHDH application for renewal of license of station WHDH–TV together with the several new applications for authorizations to operate on channel 5, we determined that the principles of the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 5 R.R. 2d 1901 (1965), should apply to this proceeding. We indicated that as we proceeded with the comparative discussion we would determine the weight to be accorded the various factors of difference between the renewal applicant, WHDH, and the competing applicants. Those determinations were made after each party was afforded the opportunity at oral argument to address itself to the question of the applicability herein of the policy statement. As it does now, WHDH then urged that because the policy statement was adopted in 1965 after the record herein was closed, the record would have to be reopened and the case retried on that basis if the policy statement were to apply to this proceeding. Disagreeing with WHDH's contention, we held that no element of surprise affecting the fairness of the hearing existed inasmuch as we did not adopt new criteria in the policy statement which would call for the introduction of new evidence but that rather we restricted the scope somewhat of existing factors and explained their importance more clearly. Thereafter, in keeping with the policy statement we asserted that a past record within the bounds of average performance would be disregarded, since average future performance is expected, and that emphasis would be given to records which, because they are either quite good or very poor, give some indication of unusual performance in the future. We recognized that a renewal applicant must literally run on his record and such record is the best indication of its future performance. However, we held that such a record is meaningful in the comparative context only if it exceeds the bounds of average performance. Upon evaluation of WHDH's past broadcast record, we held that the record is one within the bounds of average performance, such record not demonstrating unusual attention to the public's needs or interests. In addition, we agreed with the examiner that the quality of WHDH–TV's overall performance is lessened to some degree by WHDH's failure, on occasion, to provide for the discussion of certain controversial problems of local interest, and by its failure to editorialize. Accordingly, the past broadcast record of WHDH did not enter into the comparative evaluation.

3. First among the points now urged by WHDH is the assertion that our application of the policy statement without notice constituted determination of the proceeding upon revised issues, to the exclusion of the issues previously specified and upon which the case had been heard. Thus, WHDH argues that it went to hearing under "clear Commission and judicial precedents" which held without deviation that the overall operating record of WHDH, not some special limited

aspect of that record, would be the basis upon which a grant or denial of its renewal would rest. What WHDH is saying is that because the proceeding was heard on a standard comparative issue whose language then permitted extensive exploration of the various facets of WHDH's operating record and of the applicants' proposals, any contraction of the scope of the factors for comparative consideration is improper as constituting a denial of due process.[2] But the important point, as we said in our decision, is that even though the policy statement restricted somewhat the scope of existing factors and explained their importance more clearly, no new criteria were adopted which would call for the introduction of new evidence. Considered in this light, it is clear that we did not decide this proceeding upon issues different from those which were specified for hearing. Since we adopted no new criteria which would call for the introduction of new evidence, WHDH's assertions that the record herein should be reopened so that the case may be retried on the basis of the policy statement are without substance. Indeed, the examiner's extensive findings regarding the past operation of WHDH, which findings we have adopted in large part, reveal the breadth of the presentation which WHDH was permitted to make. In fact, were we to retry this proceeding as WHDH urges, its presentations would necessarily be narrowed since an aim of the policy statement is to eliminate from the hearing process time-consuming elements not substantially related to the public interest. For these reasons, we cannot agree that we erred in making the policy statement applicable to this proceeding, and we see no useful purpose which would be served by reopening the record and retrying the case on the basis of the policy statement.

4. Secondly, WHDH submits that we erred in that there is no basis upon which the Commission can categorize WHDH's performance in the years prior to 1963 as being within the bounds of average or upon which its efforts in community programing can be said to be not unusual. WHDH states that these are not standards which can be reviewed by a court, and therefore they must be rejected. Contrary to WHDH's contention, the policy statement provides a basis for so classifying WHDH's past performance. Thus, we are interested not in records within the bounds of average performance, since average future performance is expected, but in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. If unusual attention to the public's needs and interest, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, is demonstrated, then a past record exceeds the bounds of average performance. As we viewed the examiner's findings in this regard, findings which we had adopted, we were unable to find and conclude that WHDH's record demonstrated unusual attention to the public's needs and interests. We noted in our decision that our determination was also consistent with the examiner's conclusion that as a whole WHDH–TV's record is favorable. On the other hand, we held that the quality of WHDH's

[2] Since adoption of the policy statement, and the clarification therein of the decisional significance of certain matters, the standard comparative issue simply seeks to determine which of the proposals would better serve the public interest.

overall performance is lessened to some degree by WHDH's failure, on occasion, to provide for the discussion of certain controversial problems of local interest, and by its failure to editorialize—considerations which the examiner also noted. We think that the precepts of the policy statement, as we have set them forth, provide an adequate basis upon which an informed judgment can be made as to the nature of a past performance record. We know of no more useful guidelines, against which we can apply our experience, that those set forth in the policy statement. In the difficult task of evaluating a past performance record, we believe that the terms "within the bounds of average performance" and "unusual attention to the public's needs and interests" are as concrete as is permissible. In short, what is within or without those frames of reference cannot be spelled out with precision so as to have general applicability to all proceedings which may come before us. In the final analysis, those terms take on meaning as we consider past performance records in light of our experience in this area, and in the context of particular proceedings.

5. While WHDH challenges our conclusion that the quality of its overall performance is lessened to some degree by its failure on occasion to provide for the discussion of certain controversial problems of local interest, and by its failure to editorialize, it offers no persuasive reasons for modifying this conclusion. Clearly, those are significant areas of programing for the needs and interests of the public are likely to be more completely served if the licensee programs in those areas with some degree of regularity.

6. In its third point, WHDH argues that we applied illegally the comparative factor of diversification of the media of mass communications. The suggestion appears to be that because in an earlier decision in this proceeding the diversification factor did not weigh significantly against WHDH, and because the court of appeals did not disturb this holding, we are now precluded from holding contrarily. On its face, this is a specious argument inasmuch as ownership of other media of mass communication is a pertinent factor to be weighed in the comparative scales, and in a comparative proceeding such as we have here we may exercise our judgment as to the weight to be given to that factor. Our action in this regard does not, as WHDH suggests, do violence to representations which the Commission has made to Congress over the years to the effect that legislation is unnecessary to preclude discrimination against newspapers applying for broadcast licenses. Those representations are fully consistent with our action herein, i.e., the Commission does not discriminate against newspaper interests, but rather gives appropriate comparative consideration to all diversification elements.

7. WHDH argues that the decision reached herein is not only inconsistent with prior Commission policy but is also inconsistent with the Commission's policy as announced, subsequent to the release of the decision herein in "* * * three decisions of the Commission released February 8, 1969 involving the acquisition of broadcast stations by a subsidiary of the Mormon Church, by Fuqua Industries, and by Avco of California (F.C.C. 69–118, 119 and 120)." In particular, WHDH asserts that because the two Commissioners (Commissioners

Bartley and Johnson) who dissented to the action in those proceedings constituted two of the three-member majority in the instant decision such dissenting Commissioners have in effect substituted "* * * their own policy for established contrary Commission policy in a case where by freak of circumstance they become a majority of a 'majority' which in fact consists of a minority of the Commission itself." The short answer to this contention is that the actions taken on February 8, 1969, did not involve comparative proceedings where the question of the weight to be given to the diversification factor was before the Commission. Here, however, we do have a comparative proceeding. The majority voted for the applicant whom they felt most qualified on the basis of a weighing and balancing of all of the pertinent comparative criteria; the diversification factor was one criterion considered, not the only one. Thus, it is speculative in the extreme to suggest that the majority opinion in the present comparative proceeding reflects a minority position of the entire Commission on the significance of the diversification factor. Moreover, it is to be noted that the third member of the majority in the instant case, Commissioner Wadsworth, voted with the majority in the actions taken on February 8, 1969.

8. The fourth point urged by WHDH stresses that in evaluating the diversity criterion we improperly weighted the scales by referring to the following "makeweight" factors: the failure to editorialize, the premature publication in the newspaper of a preliminary draft of a report of the Massachusetts Crime Commission without also simultaneously publicizing the report over the broadcast stations, and the controlling interest in a manufacturer of CATV components which also has interests in several CATV systems which are at some distance from Boston. As we stated at greater length in our decision, those factors are also significant as showing the desirability of maximizing the diffusion of control of the media of mass communications. Their effect upon the comparative standing of WHDH in the diversification factor cannot be minimized.

9. In its fifth point, WHDH urges that we applied the integration of ownership with management criterion illegally and in a manner contrary to Commission precedent. We mention at the outset that we adopted the examiner's conclusion that both Charles River and BBI are integrated to a substantially greater degree than WHDH, whose integration is small. WHDH did not except to this conclusion. Accordingly, it cannot now urge contrarily to that conclusion. See section 1.277(a) of the Commission's rules and regulations. It is appropriate, however, to consider WHDH's contention that because it presents an operating record on the basis of which it requests renewal of license, it is academic whether the quality of that record may be attributed to integration or to other factors. As our decision makes clear, that contention is inaccurate since we expressed our basic disagreement with the examiner's conclusions that WHDH enjoys a preferred status herein because it has an operating record to advance against its competitors. Evaluation of the integration of ownership with management factor serves an important function even though one of the applicants happens to be a renewal applicant with an operating record. The importance of that factor has been stressed too many times—most

recently in our policy statement—to discard it as inconsequential simply because a renewal applicant is contesting with new applicants.

10. WHDH also asserts that we erred in awarding a significant preference to BBI on the integration factor since under the standards of *Grand Broadcasting Co.*, 36 F.C.C. 925, 2 R.R. 2d 327 (1964), only Messrs. Burdick and Pickard are entitled to consideration under that factor. We think that WHDH has misread the meaning of *Grand.* Those individuals who were given credit for integration, in addition to Messrs. Pickard and Burdick, will assume a meaningful role in the day-to-day operation of the proposed station, and importantly they will participate in that operation on a full-time basis.

11. The sixth point advanced by WHDH urges that our failure to renew its license results in the imposition of a forfeiture upon WHDH which is contrary to the public interest. WHDH submits that the Commission cannot "adopt a new policy rendering forfeit a broadcast station without affording a without-fault licensee an opportunity to dispose of his station in a reasonable and orderly fashion." WHDH submits that from the very beginning broadcasters have been encouraged to invest in a substantial way in their stations so as to better serve the public, the inducement being that they would not be deprived of that investment so long as they operated the stations in the public interest and could count upon not being subjected to any forfeiture in situations where they were without fault. WHDH's forfeiture argument is specious. When we determined that the public interest would be better served by a grant of the BBI application and a denial of the other applications including the WHDH application for renewal of license, we were not required to afford WHDH an opportunity to dispose of its station in such a way that it would not be deprived of its investment. As section 301 of the Communications Act of 1934, as amended, clearly provides, it is the purpose of the Act "to provide for the use of such channels, but not the ownership thereof, for limited periods of time * * * and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." Moreover, various private arrangements are available to a licensee as a means of recouping his investment in whole or in part. With these considerations in mind, we cannot agree that denial of WHDH's renewal application after a full comparative hearing with other applicants results in a forfeiture being imposed upon it.

12. Disposition of the two remaining points urged by WHDH will be reserved for inclusion within the following discussion of BBI's petition for rehearing, because of their relationship to arguments made by BBI. Those points charge that we erred in our conclusions of unauthorized transfer of control and in awarding only a slight demerit to BBI for its programing proposal.

II. The BBI Petition for Rehearing

13. WHDH and BBI take different positions with regard to our ultimate conclusion that WHDH was obligated to file applications for consent to involuntary transfer of control when Winslow and Choate died, and when Choate, in the first instance, and then Akerson

succeeded to the office of president. We held further that because WHDH did not attempt to misrepresent to, or conceal from, the Commission the facts bearing on ownership and control, absolute disqualification of WHDH was unwarranted. However, in the comparative evaluation, WHDH was assigned a demerit.

14. In addition to stating that there is no FCC form on which approval of a "transfer of control" through a change in the office of president of the Herald-Traveler can be requested, WHDH questions our holding that an application on form 316 should have been filed requesting consent for involuntary transfer of control when first Winslow and then Choate died and when Choate and thereafter Akerson succeeded to the presidency. In this connection, WHDH asserts that Winslow could not have been in control of the Herald-Traveler at his death if Choate had assumed control when he was elected president, and that Choate could not have been in control of the Herald-Traveler at his death if Akerson assumed such control when he was elected president. Thus, Choate assumed the presidency more than 3 years before the death of Winslow, and Akerson succeeded to that office about 10 weeks before the death of Choate. WHDH also contends that when the Commission in May 1964 directed WHDH to file an amendment to its application to reflect the absence of Choate and added an issue inquiring into the changes made as a result of Choate's death, no reference was made to any transfer of control. That action, WHDH submits, "cannot be reconciled with a claim that the facts, which, indisputably, were known to the Commission, involved any transfer of control within the meaning of section 310(b)." Lastly, WHDH asserts that there is nothing unique about the extent of control vested in the president of the Herald-Traveler, and points to various administrative interpretations of section 310(b), including the Commission's recent action in Avco Broadcasting of California,[3] "as not requiring any approval of changes of executive control of Avco comparable in importance to the Winslow-Choate-Akerson changes at Herald-Traveler." WHDH adds "that the changes in executive control of Avco were called directly to the attention of the participating Commissioners in this proceeding. No allegation of unauthorized transfer of executive control of Avco was made by any of them in the Commissioner-contested action of February 8, 1969, granting Avco Broadcasting of California an assignment of the license of station WRTH."

15. Arguing that it does not contend that Choate's replacement of Winslow as president amounted to a transfer of control, and that such a conclusion is not warranted by the facts, BBI asserts, however, that Akerson's ascendancy to the presidency was an unauthorized assumption of de facto control. BBI goes further, stating that Akerson's becoming president represented a de facto transfer "resulting from a transfer of de jure control into the hands of Garfinkle." Thus, while agreeing with the Commission that Akerson's unauthorized assumption of de facto control, standing alone, supports the comparative demerit

[3] *Madison County Broadcasting Co., Inc.*, F.C.C. 69–120, 16 F.C.C. 2d 471, released Feb. 8, 1969.

assessed against WHDH, BBI submits that we should also conclude that an unauthorized transfer of de jure control occurred at the same point in time. Thus, BBI urges that with additional conclusions "that the unauthorized transfers of de facto control were a part and parcel of the unauthorized transfer of de jure control" and that WHDH has sought to misrepresent and conceal from the Commission the facts bearing on its ownership and control, absolute disqualification of WHDH is dictated.

16. A modification of our conclusions regarding unauthorized transfers of control is warranted because of clarifying considerations which have been brought to our attention. Thus, because the deaths of Winslow and Choate did not occur simultaneously with the accession to the presidency of Choate and then Akerson, as our conclusions seemed to indicate, we were incorrect in holding that section 1.541 of our rules is applicable, thereby requiring an FCC form 316 application to be filed. In the circumstances related, no involuntary transfer of control occurred. Therefore, we delete reference to section 1.541 of the rules, to FCC form 316, and to the following conclusion in paragraph 46 of our decision:

> In our judgment, therefore, WHDH was obligated to file an application for consent to involuntary transfer of control when Winslow and Choate died, and when Choate, in the first instance, and then Akerson succeeded to the office of president.

17. Nevertheless, we adhere to our conclusion that unauthorized transfers of de facto control occurred when Choate succeeded Winslow as president and when Akerson succeeded Choate in that office. This conclusion is premised upon those facts which we set forth in paragraph 44 of our decision which show the substantiality of the actual control centered in the office of president. What occurred here, as we said in disagreeing with the examiner's conclusions in this regard, were events far more significant than mere changes in officers. The changes in question involved transfers of actual control, and of "the power to dominate the mangement of the corporate affairs" of the licensee corporation. Cf. *Western Gateway Broadcasting Corp.*, 6 R.R. 1325 (1951). We also reiterate the holding of the *Powel Crosley, Jr.*, case, 3 R.R. 6 (1945), to the effect that nothing in section 310(b) of the act restricts "control" to a majority of the stock or to any definite percentage of the stock. Thus, we there stated that a realistic definition of the term "control" includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue. Although WHDH suggests that the facts relating to changes in the presidency were known to us in 1964 when we added an issue in this proceeding, yet no reference was made to any transfer of control, we point out that it was not until the hearing fully developed those matters bearing on the extent of the dominance of the occupant of the office of president over corporate affairs that we became aware of the possible occurrence of unauthorized transfers of control. By the same token, other administrative interpretations of section 310(b) to which WHDH alludes are not controlling here, particularly when WHDH

makes no showing that a similar thoroughness of exploration of questions of transfer of control was made, or that the significance of the presidency was at all comparable to that shown here.

18. The facts surrounding the unauthorized transfers of control were peculiarly within the knowledge of WHDH as they occurred. Because the responsibility for initiating a request for voluntary consent to a transfer of control rests with the licensee, not with the Commission, any uncertainties as to whether a proposed transaction would result in a transfer within the meaning of section 310(b) as interpreted by the Commission are to be resolved by bringing the complete facts of the proposed transfer to the attention of the Commission, in advance of any consummation of the transaction, for a determination whether Commission approval is required. *Procedure on Transfer and Assignment of Licenses*, 4 R.R. 342 (1948). Whether, for example, the Commission's attention should have been invited to those changes by submission of an application on FCC form 315 or by an informal application in letter form (sec. 1.531 of the rules) need not be determined now, for it is clear that our procedures are sufficiently flexible to permit appropriate action upon a request for a transfer of control. The important consideration here is that our consent to the transfers of control was not sought. However, as we stated in our decision, because WHDH has never attempted to misrepresent to, or conceal from, the Commission the facts bearing on ownership and control, the circumstances presented here do not reflect so adversely on the character qualifications of the licensee as to warrant its absolute disqualification. The facts of the unauthorized transfers of control do, however, enter into the comparative evaluation, and in this regard WHDH properly received a demerit.

19. The request of BBI for additional conclusions which assertedly would result in the absolute disqualification of WHDH is rejected. With the exception of the de facto control question, we agreed with the conclusions which the examiner reached on the noncomparative issues relating to WHDH. Those conclusions reflected the examiner's careful evaluation of the record evidence, and again we are persuaded that no sound reason exists for disturbing them.

20. As we indicated earlier herein, WHDH's charge that we erred in awarding only a slight demerit to BBI for its programing proposal will be discussed in conjunction with BBI's assertion that, contrary to our holding, the record herein requires the conclusion that BBI's proposal demonstrates unusual attention to the public's needs and interests. WHDH's argument in support of its assertion of error runs as follows: the examiner rejected BBI's program proposal of 36.3 percent local live programing, a total of over 8 hours a day; in *Veterans Broadcasting Co.*[4] the Commission awarded a low ranking under the overall proposed programing criterion to an applicant "whose local live program proposal was nearly but not quite as extravagant as that of BBI's"; the policy statement holds that if there is a substantial indication that any party will not be able to carry out its proposals to a significant degree, the proposals themselves will

be considered deficient; BBI's demerit should not be held to be slight; and a decision "which tries to find a public interest basis for substituting 'deficient' programing for even 'average' programs prima facie runs counter to the public interest." On the other hand, although submitting that the WHDH record of performance is substantially below average as urged in its exceptions, BBI urges that if the WHDH record is one within the bounds of average performance then the BBI proposal necessarily must manifest superior devotion to public service. In this connection, BBI urges considerations which were before us as we evaluated the proposed program services, and upon further study of our findings and conclusions in this area of comparison we see no reason to disturb them. For example, BBI asserts that our assessment to it of a slight demerit because of its insufficiently supported local live programing proposal is based on the erroneous premise that BBI's ascertainment of community needs and interests had no appreciable effect upon those program proposals. BBI suggests that the manifest error of that conclusion is demonstrated by reference to BBI exhibit 3–E, attachment 5, consisting of 100 pages of text "describing the manner in which the ascertained needs were translated into program proposals, which were then reappraised by community representatives whose cooperation was reconfirmed." We considered these showings, however, and we were not persuaded that BBI's ascertainment of community needs and interests had any appreciable effect upon its program proposals. Nor do we believe that BBI should be accorded, as urgent by WHDH, more than a slight demerit because of its insufficiently supported local live programing proposal. Except for the insufficient support shown for the unusually large amount of local live programing proposed, which resulted in the demerit's being assessed, BBI nonetheless proposes, as we concluded, a generally well-balanced program schedule, which would offer the Boston community a diversity of excellent programs. In these circumstances, we cannot agree with WHDH that a grant of the BBI application substitutes deficient programing for programing which was found to be within the bounds of average performance.

21. In further support of its petition for rehearing, BBI also urges that the status of WHDH herein is that of an applicant for initial authorization, rather than for renewal of license, because we concluded implicitly in our decision that no initial award in dockets Nos. 8739 and 11070 should be made. BBI asserts that we should state explicitly that our decision did not reaffirm the earlier grant to WHDH, nor did it reevaluate the record of the earlier proceeding to determine whether, in light of Choate's death, the award should be made to WHDH or to Greater Boston I. Although we did not specifically state that we adopted the examiner's conclusion that modification of our decision of September 25, 1962 (wherein WHDH was granted a renewal of license for a 4-month period) would not serve the public interest, we think that it is apparent from our decision of January 23, 1969, that this was the case. Indeed, it was our attention to adopt the examiner's conclusion in this regard, and to treat the application of WHDH as one for the renewal of license of station WHDH–TV. Accordingly, we now expressly adopt the examiner's conclusions, with respect to

the issues added because of Choate's death, that no material changes have been made by WHDH as a result of Choate's death, that reevaluation of the original record made by WHDH and Greater Boston I would advance neither the interests of either applicant nor the overriding public interest in the termination of this lengthy proceeding, and that modification of the Commission's decision of September 25, 1962, would not serve the public interest.

22. Finally, BBI urges that we should make clear: (*a*) that the "knowingly false testimony" of Akerson and Garfinkle reflects adversely on WHDH, at least in a comparative sense, if not in a disqualifying sense; and (*b*) that "the record evidence of WHDH's continued willingness to utilize extra-legal methods of advancing its cause reflect adversely on its comparative qualifications." In light of our denial of the WHDH application on other grounds, we believe that it is unnecessary to resolve these particular contentions.

III. The Charles River Petition for Rehearing

23. Charles River submits that it was inappropriate for the Commission in its decision "to refuse to pass upon the question of ex parte contacts and their subsequent ratification and condonation by WHDH" because this was one of the central issues in the case, and the Commission is duty bound to make findings on all such issues and to assign comparative weight to them. As we said with respect to a similar contention made by BBI, it is unnecessary to determine whether the examiner reached a proper result on this question in view of our denial of the WHDH application on other grounds.

24. Charles River's second point relates to our determination that BBI is to be preferred over it on the basis of the comparative criteria.[5] However, we gave careful consideration to the showings made by both Charles River and BBI under the pertinent comparative criteria, and no reasons are presented in Charles River's petition which warrant a departure from the conclusions reached thereunder. As we stated on another occasion, rehearing will not be granted merely for the purpose of again debating matters which we have fully considered. *WWIZ, Inc.*, 37 F.C.C. 685, 3 R.R. 2d 316 (1964).

25. In its third point, Charles River advances, as grounds for reconsideration of our decision, a procedural argument to the effect that a quorum of the Commission did not participate in the decision which results in a choice being made between Charles River and BBI. Charles River submits that making a choice between Charles River and BBI "was an entirely severable question from the decision whether WHDH should or should not be permitted to continue operating on channel 5." Charles River argues that only three Commissioners (Commissioners Bartley, Wadsworth, and Johnson) participated in the decision whether to grant the application of Charles River or that of BBI

[5] Charles River asserts that our finding in par. 41 of the decision, in support of the slight demerit accorded to Charles River because of certain limitations on its ability to editorialize, does not accurately reflect the record. However, it should be noted that such finding is based upon the examiner's findings at par. 236 of the initial decision, to which Charles River did not except.

since "Chairman Hyde and Commissioner Robert E. Lee cast no vote and apparently did not participate in the deliberations as to whether the application of Charles River or BBI should be preferred." The fallacy in Charles River's argument lies in the fact that severable questions were not presented which called for separate consideration and a separate vote by the participating Commissioners. Thus, after having found WHDH basically qualified the question for determination related to which of the several basically qualified applicants should be awarded the permit. In this connection, it is clear that a quorum of the Commission participated in the deliberations resulting in the award of the permit to BBI inasmuch as Commissioners Bartley, Wadsworth, and Johnson voted to grant the application of BBI, Commissioner Robert E. Lee dissented to the grant of the BBI application and voted to renew the application of WHDH, and Chairman Hyde abstained from voting.

26. Finally, Charles River asserts that reargument herein is desirable because at the time the Commission heard oral argument only five of the seven Commissioners were eligible to participate; and that while one of the ineligible Commissioners has been replaced, the new Commissioner (Commissioner H. Rex Lee) did not hear oral argument and presumably for this reason decided not to participate in the decision. Therefore, Charles River urges that, in view of the importance and seriousness of the matter involved herein, the Commission give serious consideration to ordering reargument herein before all six eligible Commissioners and "to have them follow the procedure as to voting and deliberation set forth in this petition." Having already determined that a quorum of the Commission participated in the decision in this proceeding, we see no useful purpose which would be served by ordering reargument herein. Contrarily, the attendant further delay in concluding this proceeding would not be in the public interest.

IV. The Greater Boston TV Co., Inc. Petition for Rehearing

27. Greater Boston TV Co., Inc., submits that we erred in disqualifying it because of the inadequacy of its efforts to ascertain programing needs and because of its failure to show the reasonable availability of its proposed antenna site. Regarding the first ground, Greater Boston asserts that it proposed to continue WHDH's programs, which programs have been found to be within the bounds of average performance, and now to conclude "that the programs proposed by Greater Boston were adequate but that Greater Boston should be disqualified for arriving at its program proposal in a way not blessed by the Commission, is almost a reductio ad absurdum of the bureaucratic process." The complete answer to this contention is found in paragraphs 713 and 714 of the initial decision where the examiner resolved the question adversely to Greater Boston. At paragraph 12 of our decision we indicated our agreement with those conclusions of the examiner. Nothing now presented to us by Greater Boston persuades us that a different conclusion is required.

28. Respecting the question of reasonable availability of its proposed antenna site, Greater Boston points out that it proposed to negotiate the lease or purchase of the antenna site presently being used by WHDH. In support of its assertion of error, Greater Boston states only that "it flies in the face of common sense to fail to acknowledge that the present tower and antenna are worth more to the licensee of channel 5 in Boston than they are worth to anyone else; and it insults the intelligence and integrity of the directors of the Herald-Traveler Corp. to imply that they would not deal with the ultimate licensee." Those assertions, however, do not persuade us that we erred in expressing our agreement with the examiner's adverse resolution of this question in paragraphs 716 and 717 of the initial decision. Among other things, the examiner stated that although it was conceded that if WHDH could not operate on channel 5 it would be faced with the question of disposing of its TV property, Mr. Akerson testified that there were alternatives to the sale or lease to the winner which would have to be explored. The examiner concluded that the other uses to which the property might be put are, in the absence of proof to the contrary, reasonable and were plausibly advanced.

29. Although Greater Boston was held to be disqualified, and therefore not entitled to comparative consideration with the other applicants, nevertheless the examiner discussed its claims under the comparative issue. As we stated in paragraph 12 of our decision, we agree with the examiner's conclusion at paragraph 793 of his initial decision that even if comparative consideration were given to Greater Boston II's application, the showings thereunder are unimpressive. Thus, we must also reject Greater Boston's contention that in addition to reversing its decision on the disqualifying issues, the Commission must accord it the comparative evaluation to which it is entitled.

V. Charles River's Further Petition for Rehearing

30. Charles River submits that a letter [6] to the Commission from BBI's counsel "clearly reveals changes in the composition of the applicant which could have a significant bearing upon the Commission's decision." Charles River therefore requests that the hearing record herein be reopened so that the matters treated in the BBI letter can be fully explored and a comparative determination made on the basis of a complete record. Charles River urges that BBI has violated section 1.65 [7] of the Commission's rules in not timely reporting the facts disclosed in the letter to the other parties and to the Commission and that earlier disclosure should have been made accompanied by a petition for leave to amend the BBI application. Thereby, Charles River states, all of the parties would have been afforded an opportunity to address themselves to the amendment and to submit appro-

[6] Dated Feb. 20, 1969, and filed with the Commission on Feb. 24, 1969. A 15-page appendix is attached to the letter which reflects the result of an inquiry made of each BBI stockholder "as to the existence of changes of any nature which might in any way be considered as germane to the proceedings." Copies of that letter were sent to other counsel, and a copy was hand-delivered to counsel for Charles River on Feb. 24, 1969.

[7] Sec. 1.65 of the rules and regulations is set forth in its entirety in attachment B hereto.

priate pleadings to the Commission as to whether the information disclosed required a reopening of the record.

31. Among other things, BBI's letter stated that the passage of time has resulted in changes of employment by five of the six BBI principals who have committed themselves to full-time employment at the station,[8] and added "[h]owever, it has been ascertained that each is still willing and able to carry out his commitment to the applicant." Charles River asserts that it is inappropriate to present this evidence in the form of an unsworn statement by counsel, and that counsel did not even attach a sworn statement of the principals to that effect.

32. Charles River points out that BBI was awarded a substantial preference herein because of BBI's proposed integration of management and ownership, that the five persons who have changed employment represent the major part of that integration proposal, and that those persons were cross-examined or subject to cross-examination at the original hearing concerning their ability and willingness to give up their then current employment in order to carry out their commitments to devote full time to BBI's proposed station. Obviously, Charles River submits, a substantial change of present employment by those principals could have a direct bearing upon either the ability or willingness of those individuals to fulfill such pledges.

33. Although Charles River speaks of five persons, it refers to only four persons in its petition, i.e., Messrs. Burdick, David, Hoffman, and Wood. Each is discussed below:

(*a*) Burdick.—Charles River asserts that while it was found in the initial decision that Burdick planned to have his family join him in a Boston home by September 1964, it appears from BBI's letter that Burdick now resides in New York City where he is employed with Visual Information Systems. Charles River states that BBI was content to wait until almost a month after the final decision herein was issued to reveal that neither Burdick nor his family was residing in Boston.

(*b*) David.—Charles River points out that while at the time of the hearing David was employed with a Boston law firm, the BBI letter reveals that on February 1, 1968, he left that firm to open his own law office. In this connection, Charles River asserts that this information supports demerits against David because he has shown no capacity to maintain lasting professional relationships in any of his activities.

(*c*) Hoffman.—Charles River states that BBI's letter reveals that between January 1967 and October 1968 Hoffman (Martin B.) "acquired significant interests in CATV systems in the Boston area and in television station WEMT in Bangor, Maine * * * (which) were allegedly disposed of on January 27, 1969." Charles River asserts that these facts are significant since BBI urged throughout the hearing that WHDH was subjected to a major demerit and Charles River to some demerit because of ownership by their principals of media of mass communications.

(*d*) Wood.—Charles River states that Wood changed employment in 1967 to become a vice president of Metromedia Producers Corp., and that since Metromedia owns many broadcast interests this is a significant factor which should be explored in a hearing. In this connection, Charles River states that BBI's letter does not reveal whether Wood intends to retain his position both with BBI and Metromedia.[9]

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[8] The six principals so committing themselves are Messrs. David, Burdick, Pickard, Steele, Hoffman, and Mrs. West. With the exception of Martin B. Hoffman, all have changed employment.

[9] Wood's participation in BBI's proposed operation was entitled to little credit because he proposed to devote only 5 hours per week to that operation. Thus, Wood was not one of the six individuals whose full-time participation in the proposed BBI operation contributed to the preference which BBI was awarded on the integration factor.

34. In its response to Charles River's petition, BBI urges that both in the *Report and Order* (3 R.R. 2d 1622) promulgating rule 1.65 and in the rule itself emphasis is placed upon the reporting of significant and substantial changes in any pending application, which may be significant to the Commission's consideration of the application and the determination of the public interest. BBI submits that it is offensive to any concept of finality to reopen the record to assess the weight to be attributed to such minutiae as the facts that: (*a*) David has left the law firm with which he was associated for 6 years to establish his own practice; (*b*) Burdick has lived in New York between the termination of the evidentiary hearing and the issuance of the Commission's decision; (*c*) Hoffman briefly held less than 1 percent of the outstanding stock of a television licensee located more than 200 miles from Boston, and a "few essentially inchoate CATV interests";[10] or (*d*) Wood is vice president of a program production company which is, in turn, a wholly owned subsidiary of Metromedia, Inc., a Commission licensee. BBI urges that since none of the changes referred to by Charles River resulted in an individual's inability or unwillingness to meet his integration proposal, BBI was not obligated to amend its application to reflect the fact.

35. Charles River's further petition for rehearing will be denied. Although Charles River asserts that BBI has violated section 1.65 of our rules, Charles River has not specifically requested that the issues herein be enlarged to permit a determination to be made thereunder. Had such an issue been requested, Charles River would have been obligated to comply with section 1.229 of our rules which provides that petitions for enlargement of issues shall contain specific allegations of fact sufficient to support the action requested and that such allegations shall be supported by affidavits of a person or persons having personal knowledge thereof. No affidavits to the effect that BBI's principals do not now intend to fulfill the commitments they earlier made under oath to the Commission are submitted with the further petition for rehearing. As noted earlier herein, Charles River's principal assertion is that "a substantial change of present employment by these principals *could have* a direct bearing upon either the ability or willingness of these individuals to fulfill such pledge," (emphasis supplied). The showings made by Charles River in their totality are insufficient to support the relief which it requests.

36. While it would have been desirable for BBI to have submitted affidavits from each of its principals expressing his intention to carry out his commitment, we do not believe that this was essential in light of the insubstantial nature of the changes which have been brought to our attention. We think that nothing more was required than the submission of the information contained in the BBI letter. Thus, the section 1.65 procedures were not required to be followed inasmuch as the changes disclosed by BBI are not substantial and do not have a

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[10] BBI points out that Charles River overlooks the fact that it did not amend its application to reflect the fact that in March 1966, the application of WCRB, Inc. (a wholly owned subsidiary of Mr. Jones' Charles River Broadcasting Co.), for a new FM station in Springfield, Mass., was granted. (3 F.C.C. 2d 75.) It was noted at par. 367 of the initial decision that WCRB, Inc., was then an applicant for that station. BBI does not, however, suggest that the record should be reopened to explore this matter.

significant impact upon the status of the BBI application. Moreover, to the extent that any question should arise at a later time regarding BBI's representations, we hereby note that BBI is expected in good faith to effectuate its proposals consistent with its commitments. The failure of a successful applicant to perform as promised provides a basis for the institution of a proceeding to determine whether it is fit to be or to continue to be a licensee of the Commission. Cf. *Theodore Granik*, 13 F.C.C. 2d 344 (1968).

VI. Other Matters

37. Request to stay effectiveness of decision: In its pleading filed on February 24, 1969, WHDH requested that the Commission postpone the effective date of its decision to a later one to be specified by further order, pending disposition of WHDH's petition for rehearing and pending judicial review if appellate procedures are thereafter instituted. The first portion of WHDH's request for relief may be dismissed as moot because section 307(d) of the Communications Act of 1934, as amended, and section 558(c) of the Administrative Procedure Act provide that an existing license is to be continued in effect pending disposition of a petition for rehearing. The second portion of WHDH's request is premature at this time, and will therefore be dismissed. In any event, it is to be recalled that we specified no date for the termination of the operation of station WHDH–TV, when we released our decision on January 23, 1969, because of the retention of jurisdiction by the U.S. Court of Appeals of the D.C. Circuit of certain portions of these consolidated proceedings.

38. Charles River filed a memorandum in which it commented upon WHDH's request to stay the effectiveness of our decision. Charles River asserts that we should not grant the relief requested by WHDH, but, instead, that we should provide for a joint interim operation on channel 5 by all of the eligible applicants in this proceeding. This is desirable, Charles River urges, because in this complex and precedent-making proceeding it is highly probable that further administrative and judicial proceedings will be necessary, which will be extremely time consuming. In addition, Charles River submits that because the WHDH application has been denied and the BBI application, although granted, is subject to vigorous objections, no single applicant should be permitted to operate on channel 5 while further proceedings are conducted. We can see no useful purpose which would be served by providing for an interim operation on channel 5 at this juncture. Indeed, it should be noted that a similar request was made by BBI when, in early 1964, we consolidated the reopened proceedings in dockets Nos. 8739 and 11070 with the proceedings in dockets Nos. 15204–15207. That request was denied by our memorandum opinion and order released on September 4, 1964. *WHDH, Inc.*, F.C.C. 64–808. Two recent cases,[11] cited to us by Charles River in support of its request for interim operation are distinguishable. Unlike the television station oper-

[11] *Consolidated Nine, Inc.* v. *FCC*, —— U.S. App. D.C. ——, —— F. 2d ——, 14 R.R. 2d 2006 (1968); *Community First Corporation* v. *FCC*, —— U.S. App. D.C. ——, —— F. 2d ——, 14 R.R. 2d 2019 (1968).

ators in those cases, WHDH here received a valid grant of a license even though such license was issued for a period of 4 months only, and that grant has not been vacated. In addition, providing for an interim operation here is inappropriate inasmuch as the further proceedings have run their course with the result that the renewal application of WHDH has been denied, and BBI's application has been granted.

39. *Request for Specification of Termination Date.* As we stated in paragraph 1, supra, we specified no date for termination of the operation of station WHDH–TV inasmuch as portions of these consolidated proceedings are yet to be determined by the court, and as to which the court retained jurisdiction. BBI now requests that we specify an early date for termination of that operation, urging that WHDH's status in docket No. 15204 is not as a "renewal" applicant, but as one seeking an initial grant. BBI submits that since WHDH's application has been denied, and since BBI's application has been granted, BBI is under an obligation, pursuant to section 1.598 of the rules, to commence construction of its new facility and to be ready to place it in operation within 8 months. BBI therefore suggests that August 1, 1969 be specified as the termination date. Thus, BBI argues that because the earlier proceeding has "been effectively mooted" the court is left with nothing of substance to determine, except to approve of the Commission's decision to render no further decision in dockets Nos. 8739 and 11070 (involving the applications of WHDH and Greater Boston I only). BBI submits, therefore, that there is no connection between any residual judicial review of the Commission's determination in dockets Nos. 8739 and 11070, and the specification of a termination date for the operation of WHDH–TV. We must reject BBI's request that we now specify a termination date. In paragraph 21, supra, we disposed of BBI's contention that the status of WHDH herein is that of an applicant for initial authorization, rather than for renewal of license. We expressly stated therein that the application of WHDH is to be treated as one for the renewal of license of station WHDH–TV. The reasons given there are equally applicable to the contention which BBI now makes. Accordingly, in light of the matters which are yet to be determined by the court, it is inappropriate at this time to specify a date for the termination of operation of station WHDH–TV.

40. In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH–TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the "* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * * ." Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for channel 5 would be

accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license.

41. Accordingly, *It is ordered*, That the petition for rehearing, filed February 24, 1969, by WHDH, Inc., *Is granted* to the extent that the Commission's decision, released January 23, 1969, *Is modified* as indicated herein, and that such petition *Is denied* in all other respects.

42. *It is further ordered*, That the petition for rehearing, filed February 24, 1969, by Greater Boston TV Co., Inc., *Is denied*.

43. *It is further ordered*, That the petition for rehearing, filed February 24, 1969, by Charles River Civic Television, Inc., *Is denied*.

44. *It is further ordered*, That the further petition for rehearing, filed March 14, 1969, by Charles River Civic Television, Inc., *Is denied*.

45. *It is further ordered*, That the request of Charles River Civic Television, Inc., for joint interim operation of channel 5, which request is embodied in its memorandum filed March 5, 1969, *Is denied*.

46. *It is further ordered*, That the petition pursuant to section 405, filed February 20, 1969, by Boston Broadcasters, Inc., *Is granted* to the extent that the Commission's decision, released January 23, 1969, *Is modified* as indicated herein, and that such petition *Is denied* in all other respects.

47. *It is further ordered*, That the request to stay effectiveness of the Commission's decision herein, filed February 24, 1969, by WHDH, Inc., *Is dismissed* as moot insofar as it requests a stay pending action upon the petitions for rehearing, and *Is dismissed* as premature insofar as it requests a stay pending judicial review if appellate procedures are later instituted.

48. *It is further ordered*, That the request for specification of termination date, filed February 20, 1969, by Boston Broadcasters, Inc., *Is denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

Pleadings in Boston, Mass., Channel 5, Television Proceeding

I

(1) Petition for Rehearing, filed February 24, 1969, by WHDH, Inc.
(2) Errata to (1), filed by WHDH, Inc., on February 25, 1969.
(3) Opposition to (1), filed March 10, 1969, by BBI.*
(4) Addendum to (2), filed February 27, 1969, by WHDH, Inc.
(5) Comments of Broadcast Bureau on (1), filed March 11, 1969.
(6) Reply to (3), filed by WHDH on March 21, 1969.
(7) Reply of WHDH to (5), filed March 21, 1969.
(8) Erratum of WHDH to (7), filed March 24, 1969.

II

(9) Petition pursuant to section 405, filed February 20, 1969, by BBI.
(10) Broadcast Bureau's Comment on (9), filed March 5, 1969.
(11) Opposition of WHDH, filed March 5, 1969, to (9).
(12) Reply to (10) and (11), filed March 12, 1969, by BBI.

*BBI, on March 10, 1969, filed (3), (16), and (19) in a single pleading.

III

(13) Petition for Rehearing, filed February 24, 1969, by Charles River.
(14) Opposition to (13), by WHDH, filed March 11, 1969.
(15) Errata of WHDH, filed March 12, 1969, to (14).
(16) Opposition to (13), filed March 10, 1969, by BBI.*

IV

(17) Petition of Greater Boston TV Co., Inc., for rehearing, filed February 24, 1969.
(18) Comments on (17) of Broadcast Bureau, filed March 5, 1969.
(19) Opposition of BBI to (17), filed March 10, 1969.*

V

(20) Request to Stay Effectiveness of Commission Decision, filed February 24, 1969, by WHDH, Inc.
(21) Memorandum by Charles River, filed March 5, 1969, containing:
1. Comments on BBI's request for specification of termination date and on WHDH's request for stay of effectiveness of decision, and
2. A proposal for joint interim operation on channel 5.
(22) Opposition of BBI, filed March 3, 1969, to (20).
(22a) Comments of Broadcast Bureau, filed March 3, 1969, on (20).
(23) Response of WHDH, filed March 11, 1969, to (21).

VI

(24) Request for Specification of Termination Date, filed February 20, 1969, by BBI.
(25) Erratum to (24), filed by BBI on February 28, 1969.
(25a) Opposition of WHDH, Inc., to (24), filed March 5, 1969 (see also (11), above).
(26) Comments of Broadcast Bureau on (24), filed March 5, 1969.
(27) Memorandum of Charles River, filed March 5, 1969, containing, inter alia, comments on BBI's request for specification of termination date.
(28) Reply of BBI, filed March 12, 1969, to (25a), (26), (27), and (11).

VII

(29) Further Petition for Rehearing, filed March 14, 1969, by Charles River.
(30) Opposition to (29), filed March 24, 1969, by BBI.
(31) Comments on (29) of Broadcast Bureau, filed March 27, 1969.
(32) Statement on (29) of WHDH, filed March 27, 1969.

APPENDIX B

Section 1.65 of the Commission's rules reads as follows:

> Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless

*BBI, on March 10, 1969, filed (3), (16), and (19) in a single pleading.

good cause is shown, submit a statement furnishing such additional or corrected information as may be appropriate, which shall be served upon parties of record in accordance with section 1.47. Where the matter is before any court for review, statements and requests to amend shall in addition be served upon the Commission's General Counsel. For the purposes of this section, an application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.

4. FCC Decision Adopted September 25, 1962, Released September 26, 1962 (33 FCC 449)

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In the Matter of WHDH, INC., BOSTON, MASS.	Docket No. 8739 File No. BPCT-248
GREATER BOSTON TELEVISION CORP., BOSTON, MASS.	Docket No. 11070 File No. BPCT-1657
MASSACHUSETTS BAY TELECASTERS, INC., BOSTON, MASS.	Docket No. 11072 File No. BPCT-1844
For Construction Permits for New Television Stations (Channel 5)	

DECISION

(Adopted September 25, 1962)

BY THE COMMISSION: CHAIRMAN MINOW DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS BARTLEY AND CRAVEN ABSENT; COMMISSIONERS FORD AND CROSS CONCURRING AND ISSUING STATEMENTS.

PRELIMINARY STATEMENT

1. On April 24, 1957 (22 FCC 767), the Commission resolved a contest between the mutually exclusive applications of WHDH, Inc.; Greater Boston Television Corp.; and Massachusetts Bay Telecasters, Inc.,[1] for new television stations on channel 5, Boston, Mass., in favor of WHDH. Greater Boston and Massachusetts Bay appealed the Commission's decision to the U.S. Court of Appeals for the District of Columbia Circuit, and on July 31, 1958, *Massachusetts Bay Telecasters* v. *FCC*, 261 F. 2d 55, the court released a decision affirming the Commission on the basis of the record on which the Commission decided the case, but remanding for inquiry into factors not contained in the original record.

[1] Allen B. DuMont Laboratories, Inc., which was an applicant at that time, has since dismissed its application.

2. After further hearing the Commission adopted a "report and recommendation" to the court on November 4, 1960, wherein it recommended that the court remand the entire case to the Commission in order that it might set aside the grant to WHDH, reevaluate the comparative positions of the applicants on the basis of the record as supplemented, and make a new determination in the light thereof.[2] By order released January 19, 1961 (cert. denied, May 8, 1961), the court approved the Commission's finding and recommendation; vacated the Commission's order of April 24, 1957, which awarded the grant to WHDH; and directed that "the proceeding be remanded to the Commission in order that it may reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission shall deem appropriate."

3. The Commission afforded the parties an opportunity to submit briefs and to present their positions in oral argument.[3] All of the parties filed briefs on July 25, 1961, and oral argument was heard by the Commission en banc on October 16, 1961.

4. The Commission's decisions of April 24, 1957, and July 14, 1960, reached certain findings of fact and basic conclusions. The Commission, after studying the briefs filed by the parties and the oral argument of October 16, 1961, has evaluated the evidence in the two records; it is concluded from this examination that the basic findings and conclusions in the original decision require modification in very limited areas only, as hereinafter indicated. Those findings and conclusions which are not modified are readopted by the Commission.[4]

5. The decision of April 24, 1957, fully compared the proposals of WHDH and Massachusetts Bay, and found WHDH to be superior. The decision of July 14, 1960, found Mr. Clark's activities on behalf of Massachusetts Bay to be "essentially similar" to those of Mr. Choate on behalf of WHDH.[5] We deem these applicants to have suffered equal impairment of their comparative status. Thus, whatever the standing of either of them may now be relative to Greater Boston, their standing relative to each other remains unchanged, for, as was stated in the preceding paragraph, the other findings and conclusions relative to them require no modification.

6. The decision of April 24, 1957, also accorded full comparison to the proposals of WHDH and Greater Boston, and found WHDH to be superior. Little distinction was found between them on local factors, both being substantially identified with the community, although what preference existed was accorded Greater Boston. While

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[2] The report and recommendation adopted the findings and conclusions of a Commission decision of July 14, 1960 (29 FCC 204), wherein it was determined that principals of WHDH and Massachusetts Bay had attempted to influence the determination of an individual Commissioner prior to the decision of Apr. 24, 1957. However, in light of the circumstances surrounding such attempts, the Commission concluded that they did not reflect so adversely on the character of the affected applicants as to require absolute disqualification, although they did have the effect of a comparative demerit.

[3] In an opinion released July 20, 1961 (FCC 61-925), 20 R.R. 410g, the Commission rejected a WHDH petition to modify this procedure in various respects.

[4] See opinion referred to in footnote, supra, in which the Commission declined to hold, in effect, that the only question to be decided here is whether the conclusions adverse to WHDH in the July 14, 1960, decision were sufficient to offset the conclusions favorable to WHDH in the Apr. 24, 1957, decision.

WHDH received some preference on the integration of its ownership with its management, and its superior preparation, its selection rested in the main on its extensive broadcast experience in the community and its commendable broadcast record which more than offset its comparative disadvantage in the area of diversification of mass media of communication. Although the Commission did not find it necessary to discuss the matter extensively in its 1957 decision, Greater Boston also suffered from the fact that its reliability was thrown into doubt by the fact that an individual central to its proposal offered false testimony in the course of the hearing. Thus, the question before us is whether the comparative advantages possessed by WHDH over Greater Boston in 1957 have been completely dissipated by the matters developed on the supplemental record.

7. The supplemental record established that shortly after Mr. McConnaughey was appointed Chairman of the Commission in 1954, Mr. Choate of WHDH, who was theretofore unacquainted with Mr. McConnaughey, arranged a luncheon meeting through a mutual friend. However, no discussion of the then-pending channel 5 case took place at the luncheon. Subsequently, Choate again met McConnaughey for lunch with a view toward presenting him a brief on proposed legislation dealing with the subject matter of a key issue in the still-pending case. The Commission concluded that these actions constituted an attempted pattern of influence whereby Choate sought to establish and later to profit by acquaintance with a member of the Commission. While Choate did not succeed in actually influencing Mr. McConnaughey, his attempt was deemed to reflect adversely on the applicant he represented. However, for reasons stated in the decision of July 14, 1960, the Commission was, and remains, of the view that while the comparative standing of WHDH was compromised, it was not destroyed, and the corporation continues eligible for comparative evaluation.

8. On the other hand, it was demonstrated on the original record that Mr. Henry, an individual of considerable significance in the Greater Boston proposal, was willing to depart from the truth while testifying under oath.[6] While we recognize that Mr. Henry's false testimony concerned a matter not central to the important issues of the case, and may well have been an attempt to conceal from his associates a segment of his personal history he did not wish revealed, the fact of such testimony and its attendant adverse implications remains.

9. Plainly, the activities of Mr. Choate and Mr. Henry differ in nature. One sought to establish a personal relationship with an adjudicatory officer in the hope that the decision would be influenced, while the other tried to conceal facts by giving untrue testimony. Both actions are contrary to basic tenets of the adjudicatory process; i.e., reliance exclusively upon the hearing record and dependence upon the truthfulness of sworn testimony given in open hearing. Each man is a person on whom both his corporation and the Commission must rely heavily, although organizational differences in the corpora-

tions preclude the possibility that their executive and administrative roles will be identical. Therefore, the activities of each reflect adversely upon the applicant he represents, for they demonstrate a willingness to depart from the rules governing fair and orderly adjudication, and thus impair the reliance the Commission may place in these applicants. There are, of course, mitigating circumstances in both cases, circumstances such as do not constitute a justification or excuse of the actions, but which, in fairness, may be considered as extenuating or reducing the degree of moral culpability. Concerning Mr. Choate, these circumstances are discussed in the July 1960 decision.[7] As to Mr. Henry, they are stated in the 1957 decision.[8] On the basis of these circumstances, the Commission, in both instances, found grounds for not disqualifying either WHDH or Greater Boston, but after carefully weighing them again, the Commission concludes that they provide no justification for assessing a larger demerit against one applicant than the other.

10. Thus, the issue must be decided on the so-called conventional criteria. We have already found that the record supports adoption of the findings and basic conclusions of the Commission's decision of April 24, 1957, and our ultimate conclusion herein must be based thereon.

11. No material distinction was found on the factor of local residence, and the slight preference accorded Greater Boston on the factors of civic participation and diversification of occupations of principals is of diminished decisional significance in view of the strong showing made by WHDH in this area. Thus, the record before us does not present a case in which the distinction between the parties on the local factors is either controlling or so substantial as to be entitled to great weight in the ultimate determination of the public interest.

12. While WHDH was accorded a slight preference for its planning and preparation, no distinction of decisional significance is apparent in the program policies or proposals of the applicants, and each has proposed studios, equipment, and staff adequate to effectuate its programing plans. Therefore, we cannot say that these factors, which are related to the suitability of the programing proposals and the applicants' immediate ability to effectuate them, furnish the basis for a determinative preference here.

13. In the area of broadcast experience, WHDH has gained a substantial preference. When this preference is coupled with a meritorious past broadcast record, and a preference on the factor of integration of ownership with management, as has been displayed by WHDH, its decisional significance is considerable, for these factors are indicators of an applicant's ability to successfully implement its proposals and conduct a continuing operation in the public interest.

14. Weighing against WHDH is its relatively disadvantageous showing on diversification of mass media of communication. Although Greater Boston is not disassociated from communications media in the area (four of its stockholders representing 11.08 percent

of its stock own 20.9 percent of Pilgrim Broadcasting Co., licensee of WORL–AM in Boston), WHDH, which is the licensee of WHDH–AM and FM in Boston and whose parent corporation publishes the Boston Herald and the Boston Traveler, has significantly more extensive communications interests. We affirm the Commission's conclusion in the decision of April 24, 1957, that Greater Boston is entitled to a substantial preference in this area.

15. However, the ultimate significance of this preference is diluted by the presence in the community of very extensive numbers of newspapers, as well as AM, FM, and television stations unassociated with the applicants. The Commission's policy of fostering diversified ownership of mass media of communication stems from the belief that the widest possible dissemination of information from diverse and competing sources best serves the public interest. Manifestly, the weight to be accorded this policy in any given case must take into account the competitive situation existing in the community involved. Where, as here, the proposal is for a community already served by numerous diversely owned outlets of expression, a grant to an entity controlling a minor fraction of such outlets has less tendency to bring about the concentration of media control which the Commission's diversification policy is designed to avoid. Therefore, although Greater Boston is entitled to a substantial preference on the diversification criteria, the decisional impact of that preference is far less than it might be if the competing applications were for a community possessing fewer existing media.

16. In summary, both applicants have made strong showings on the local factors and in the areas of proposed programing and the physical facilities with which to effectuate their proposals. The difference between them on these criteria are too slight to afford the basis for a choice. It is apparent that the ultimate selection lies, as it lay in the Commission's deliberations preceding the 1957 decision, between the preference accorded WHDH in the areas of past broadcast experience and record, and that accorded Greater Boston on the factor of diversification of mass media of communications. We believe that the public interest would be better served by a grant to WHDH, for the factors on which it has been preferred demonstrate a likelihood of a continuing operation in the public interest, while the factor on which Greater Boston has demonstrated superiority, although concerned with an important Commission policy, is of greatly diminished significance in the circumstances of this case.

17. As will appear in the decretal clause which follows, we are reinstating the grant of the application of WHDH, Inc., for a permit to construct a new television station on channel 5 in Boston. WHDH has been operating its station on channel 5 for nearly 5 years under various temporary authorizations. It has had pending since November 26, 1957, an application (BLCT–761) for license for operation of such station, and an application (BLCT–762) for authorization of an alternate main transmitter and antenna. Action upon these applications is appropriate at this time, for clearly the ordinary procedures providing a period of time within which to commence construction of the station and for completion of construction are in-

applicable in light of the fact that the station has been constructed and has been operating for nearly 5 years. In the usual situation, a license application would be granted for a term of 3 years. It is within our authority, however, to grant a license for a lesser term than 3 years. Even though the inroads made by WHDH upon the rules governing fair and orderly adjudication have been concluded to result in compromise and impairment of comparative standing only, the Commission's concern with these matters extends to the point that it believes that the public interest would be best served in the circumstances here shown by granting the license application of WHDH, Inc., for a term of 4 months only.

Accordingly, *It is ordered*, This 25th day of September 1962, that, except insofar as supplemented and modified herein and by the Commission's decision of July 14, 1960, the Commission's decision of April 24, 1957, *Is affirmed;* the grant of the application of WHDH, Inc., for a permit to construct a new television station on channel 5 in Boston, Mass., *Is reinstated;* the applications of Greater Boston Television Corp. and Massachusetts Bay Telecasters, Inc., *Are denied;* and the applications of WHDH, Inc. (BLCT–761 and BLCT–762), for licenses to cover construction permit *Are granted*, the licenses to be issued for a period of 4 months only.[9]

DISSENTING STATEMENT OF CHAIRMAN MINOW

I do not agree that the Commission serves the public interest with another award of channel 5 in Boston to WHDH, even though limiting the award to 4 months may serve some salutary purposes.

In my view, there is serious question whether an award to any one of the present applicants can be said to be in the public interest.

But in any event, there is no justification on this record for preferring WHDH, an applicant who has engaged in ex parte attempts to influence the Commission's decisional process over Greater Boston, the only present applicant who has not. Nor is there any reason to dilute to the point of insignificance the important policy of diversification of ownership of mass communication media to reach that result.

What the Commission would permit in 4 months, that is, the filing of new applications, I would permit today. And I would achieve that result without placing WHDH in a preferred status either as to its present rivals or as to any prospective applicant who might apply.

Because of the importance of this case and the significance of the majority's action, I express my views in some detail.

I. *The public interest*

The Commission in the awarding of one of these precious television licenses[1] must scrutinize most closely the qualifications of those who

[9] In light of our disposition of the Greater Boston application on the merits, the motion to dismiss the Greater Boston application filed by WHDH on July 19, 1961, is moot, and is dismissed. In light of our disposition of the proceeding herein, the petition for reargument filed on Sept. 17, 1962, by Greater Boston Television Corp. is also dismissed as moot.

[1] Boston, a city of approximately 700,000 persons located in a metropolitan area with a population in excess of 2,500,000, has been assigned three commercial VHF stations. In the year 1961, these three stations had total revenues of slightly over $21 million, had total gross profits before taxes of over $9,650,000, and in terms of depreciated capital investment earned total profits of 337 percent.

of its stock own 20.9 percent of Pilgrim Broadcasting Co., licensee of WORL–AM in Boston), WHDH, which is the licensee of WHDH–AM and FM in Boston and whose parent corporation publishes the Boston Herald and the Boston Traveler, has significantly more extensive communications interests. We affirm the Commission's conclusion in the decision of April 24, 1957, that Greater Boston is entitled to a substantial preference in this area.

15. However, the ultimate significance of this preference is diluted by the presence in the community of very extensive numbers of newspapers, as well as AM, FM, and television stations unassociated with the applicants. The Commission's policy of fostering diversified ownership of mass media of communication stems from the belief that the widest possible dissemination of information from diverse and competing sources best serves the public interest. Manifestly, the weight to be accorded this policy in any given case must take into account the competitive situation existing in the community involved. Where, as here, the proposal is for a community already served by numerous diversely owned outlets of expression, a grant to an entity controlling a minor fraction of such outlets has less tendency to bring about the concentration of media control which the Commission's diversification policy is designed to avoid. Therefore, although Greater Boston is entitled to a substantial preference on the diversification criteria, the decisional impact of that preference is far less than it might be if the competing applications were for a community possessing fewer existing media.

16. In summary, both applicants have made strong showings on the local factors and in the areas of proposed programing and the physical facilities with which to effectuate their proposals. The difference between them on these criteria are too slight to afford the basis for a choice. It is apparent that the ultimate selection lies, as it lay in the Commission's deliberations preceding the 1957 decision, between the preference accorded WHDH in the areas of past broadcast experience and record, and that accorded Greater Boston on the factor of diversification of mass media of communications. We believe that the public interest would be better served by a grant to WHDH, for the factors on which it has been preferred demonstrate a likelihood of a continuing operation in the public interest, while the factor on which Greater Boston has demonstrated superiority, although concerned with an important Commission policy, is of greatly diminished significance in the circumstances of this case.

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will be responsible to the public for day-to-day operations of the station.

In 1957, applying its "conventional criteria," the Commission found that WHDH offered an assurance of superior reliability and sensitivity to local needs which outweighed in terms of benefit to the public, the greater diversity in control over communications media serving Boston that would follow a grant to either Greater Boston Television or Massachusetts Bay Telecasters (22 FCC 767, 881–882). In 1960, upon special court remand, the Commission decided that the grant to WHDH should be vacated in view of the ex parte attempts of WHDH and Massachusetts Bay to tamper with the integrity of its processes (29 FCC 204, 210–214). Today, having obtained the court's approval of reconsideration, the majority concludes that the ex parte communications have no significant impact upon the ultimate comparative determination. Again applying the "conventional criteria," it once more selects WHDH.

In reaching this result the Commission has found that WHDH and Massachusetts Bay sought the license here at stake by means at war with recognized public processes of adjudication. While it has found "no evidence of any ex parte contacts of any kind on the part of Greater Boston" (29 FCC at 209), it now makes the critical finding that "false testimony" by Greater Boston's proposed general manager, Mr. Henry, is equivalent to the misconduct of WHDH and Massachusetts Bay. From this the majority concludes that the activities of each applicant "demonstrate a willingness to depart from the rules governing fair and orderly adjudication and thus impair the reliance" the Commission can place on them, but that none should suffer "a larger demerit" on this account.

Thus, one of the underlying premises of the majority's decision is that we are faced with three applicants who are all seriously lacking in character. I think the majority has overstressed somewhat Mr. Henry's lack of candor. But no matter which view of the facts is taken, the public interest demands a reopening of this proceeding to new applicants and a new determination upon a new record.

Before making any grant, the Commission must find that there is an affirmative public interest to be served. *Clarksburg Publishing Co.* v. *F.C.C.*, 225 F. 2d 511 (C.A.D.C.). The statute requires that we seek the best feasible result for the listening public—not the least reprehensible result consistent with immediate disposition of the matter. In this very proceeding, the court has warned that "Without a more solid predicate than mere survival, the Commission would not be justified in concluding that the least wounded becomes inevitably in the public interest the most competent to operate an important television property." *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, 261 F. 2d 55, 61, footnote 10 (C.A.D.C.). I do not see how we can make the finding which the act requires on the present record.

I recognize that under the majority's approach an opportunity will shortly be afforded to new applicants to file for this station. For the reasons I have given, I welcome this step. However, as I shall develop below, I can find no basis upon which WHDH can be preferred to its existing rivals, Greater Boston Television and Massachu-

setts Bay Telecasters. Nor can I perceive any reason to regularize the status of the present WHDH operation on channel 5, thus affording some semblance of a claim that WHDH is entitled to rely upon its past television operation as a reason for preferring it to new applicants.

Thus, I would not deny the applications of Greater Boston and Massachusetts Bay. Neither would I grant the application of WHDH. I would reopen the record now to new or amended applications, and, while they are being considered on an expedited basis, permit WHDH to continue broadcasting only as an interim trustee.[2]

II. *The conduct of the parties*

My disagreement with the majority's comparative analysis is fundamental. First, if a license is to be granted to one of the present applicants on this record, there is nothing to justify selection of WHDH, an applicant who has violated basic principles of due process, over Greater Boston, a qualified applicant who has depended solely upon the justice of its cause. Cf., *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 341 (C.A. 3).

The controlling factor is the misconduct found in the Commission's 1960 decision. Having examined the record, I accept the 1960 findings and see no reason to withdraw from them in 1962. What did the Commission then hold? It held that Mr. Choate, president of WHDH, was guilty of "attempting to establish a personal relationship with a member of the Commission [the then Chairman, Mr. McConnaughey] with the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of WHDH in the event of a close decision" (29 FCC at 212). The Commission also held that Mr. Choate "attempted to profit by the acquaintance thus established" by arranging a meeting with the Chairman in which he sought "to present * * * ex parte a legal brief on a matter so intimately concerned with the then-pending hearing that he must have been aware of the applicability of the general problem discussed therein to the specific issue at stake in the Boston hearing"[3] (29 FCC at 210, 212).

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[2] Any suggestion that the Commission is without power to take such a course is, in my view, erroneous. I do not believe that the Commission is required to seek the permission of the court of appeals, under the provisions of sec. 402(h) of the act, before reopening the record; for that section applies only "in the event that the court shall render a decision and enter an order reversing the order of the Commission," and no such decision has been rendered or order entered. Moreover, in remanding the case to us in 1961, to permit a comparative reevaluation, the court expressly authorized the Commission to "take such further action, if any, as the Commission shall deem appropriate." But in order to avoid any question on the matter, an appropriate petition seeking the court's permission to reopen the record can certainly be filed. Similarly, any rule which would prevent the filing of new applications can be waived.

[3] The brief which Mr. Choate sought to present and discuss was formally addressed to a legislative proposal which would have affected the Commission's treatment of newspaper applicants, such as WHDH, in comparative hearings, such as the present one. Unlike the special hearing examiner, Judge Stern, the Commission has found that Mr. Choate's conduct was aimed as much at influencing Chairman McConnaughey's adjudicative decision as it was at influencing his views on legislation. I believe the Commission was right in making this finding. Because Mr. Choate concededly knew that it was improper to discuss the merits of the pending case directly (Tr. 3480-3481), Mr. Choate's reliance on counsel's advice that he should seek a "legislative" meeting with the Chairman cannot excuse his conduct. Moreover, he neither sought nor received counsel's advice before arranging his first meeting with the Chairman, in the hope that a personal relationship with him might aid the WHDH cause.

The majority refers to "mitigating" circumstances, found in the 1960 decision. These were that "Mr. Choate is not guilty of offering any material inducement to influence the outcome of the proceeding or of actually arguing the merits of the case ex parte" (29 FCC at 212). But this does not square with the Commission's views in the *Miami* ex parte cases. In the Miami channel 10 and channel 7 proceedings,[4] none of the six applicants, disqualified because of their ex parte activities, had offered a "material inducement" to influence the Commission's action. Nor did North Dade Video, an applicant disqualified in the Miami channel 10 proceeding, actually argue the merits of the case ex parte; on the contrary, it was disqualified because of what it *attempted* to stimulate *others* to do. The Commission held that it did not detract "from the resultant stigma attaching to North Dade's character" that its agent was not shown to have obtained the improper influences which were sought by his principals. What was not held to be mitigating there should receive no different treatment here.

Moreover, Mr. Choate did, in practical effect, make an improper presentation in his first meeting with Chairman McConnaughey. It is true that after mentioning that he was an applicant for channel 5 in Boston, Mr. Choate did not talk directly about the merits of the pending case. As found by the Commission, however, his real purpose in arranging the meeting was to demonstrate "by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest" (29 FCC at 211). Chairman McConnaughey himself so recognized.[5]

Given the nature of the comparative hearing, Mr. Choate's action was realistically an argument or presentation on the merits. For in such proceedings—unlike the ordinary judicial proceeding—the personal attributes of a party's principals are a vital consideration. In applying comparative criteria such as civic participation, broadcast experience, or integration of ownership with management, the Commission does not base its judgment solely on the mathematical extent of a principal's participation or experience. Rather, it takes into account the qualitative nature, "meaningfulness," and "effectiveness" of the same.[6]

If a litigant before a court attempted to establish "a personal relationship" with the judge in "the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of [the litigant] in the event of a close decision," we all know what would happen. Such conduct is even worse when it occurs before an agency where the character of the litigant himself is, of necessity, an

[4] *WKAT, Inc.*, 29 FCC 216 (1960); *Biscayne Television Corp.*, 31 FCC 237 (1961).

[5] Thus, Chairman McConnaughey testified that Mr. Choate, for WHDH, and Mr. Clark for Massachusetts Bay, sought to "make a good impression, to put their best foot forward and let me know what responsible, capable people they were" (Tr. 3754; see also Tr. 3798, 3831).

[6] In this proceeding, the nature of Mr. Choate's integration was found to be enhanced by his "experience in broadcasting" and distinguished civic record" (22 FCC at 865). Because of its "effectiveness," the integration of Mr. Choate, with an ownership interest of 1.59 percent, was judged equivalent to the integration of principals owning 19.2 percent of the Massachusetts Bay stock into the operation of that applicant's proposed station (22 FCC at 866). See also, e.g., *Beachview Broadcasting Corp.*, 11 Pike & Fischer, R.R. 939, 963-964.

issue. In the recent *WKAT* decision (case No. 13718, C.A.D.C., decided July 6, 1961), the court stated:

> Surreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisdiction, eat at the very heart of our system of government—due process, fairplay, open proceedings, unbiased, uninfluenced decision. He who engages in such efforts in a contest before an administrative agency is fortunate if he loses no more than the matter involved in that proceeding.

I do not take the position that WHDH and Massachusetts Bay (which was found to have engaged in parallel misconduct) should necessarily have been disqualified. In a comparative context, however, an award to either of these parties permits an applicant to engage in improper tampering with the adjudicative process and still prevail over a qualified competitor who has not. Surely a Commission action which provides this instruction for the bar, the public, and the industry can be justified only by most extraordinary and compelling considerations. Otherwise, to use the Broadcast Bureau's phrase, deliberate subversion of the Commission's processes "becomes nothing more than a matter of calculated risk."

How, then, does the majority justify a reaward to WHDH? The primary consideration is the asserted "false testimony" of Mr. Michael Henry, proposed general manager of Greater Boston. The offenses of Mr. Henry and Mr. Choate, in the eyes of the majority, "provide no justification for assessing a larger demerit against one applicant than the other."[7] Hence, it concludes, the case "must be decided on the so-called conventional criteria." Applying these criteria as if no misconduct had occurred, the majority favors WHDH for the same reasons as those upon which the Commission relied in 1957.

The question of Mr. Henry's truthfulness was thoroughly canvassed and weighed in the 1957 decision. It was not then thought to have the overriding and determinative significance which the majority now attributes to it. On the contrary, while "some demerit" was thought to attach to Greater Boston because of Mr. Henry's "lack of candor" (22 FCC at 881), the demerit did not figure largely in the Commission's ultimate evaluation. For after giving it due consideration, the decision goes on to state that the ultimate question is "whether the inferior position of WHDH on the factor of diversification is of *controlling weight* as to Greater Boston and MBT when assessed against the superiority of WHDH with particular reference to past performance record and broadcast experience of principals" (emphasis added, 22 FCC at 882). What was in 1957 a "lack of candor" is now a willingness to "depart from the truth while testifying under oath" and a deliberate attempt "to conceal facts by giving untrue testimony." Thus reevaluated, Mr. Henry's conduct becomes the fulcrum upon which the majority decision turns.

I think the Commission's 1957 treatment of Mr. Henry's conduct as having less than overriding significance was correct.

The controversy centers upon Mr. Henry's testimony concerning his loss of his license to practice law some 15 years prior to the

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[7] WHDH and Massachusetts Bay, the majority holds, "have suffered equal impairment of their comparative status," due to the "essentially similar" approaches of Mr. Choate, for WHDH, and Mr. Clark, for Massachusetts Bay.

hearings in this case. The examiner who heard and saw Mr. Henry rejected any claim that his testimony was less than truthful. The Commission—relying upon what it considered the inherent incredibility of certain statements—overruled him on this point (22 FCC at 880–881). I can find no basis for setting aside the examiner's views.

The facts of this matter, as they appear from the record, are these:

Prior to 1939, Mr. Henry practiced law in St. Louis, Mo., using his given name, "John H. Kenealy."[8] In 1939, he left the practice of law and entered upon a new career—first in newspaper reporting and later in broadcasting. At some time during this period (the exact date does not appear), a committee of the State bar held a hearing and found him guilty of professional misconduct.[9] No disbarment proceeding, however, was instituted.

Instead, in April of 1940, when he was working for a broadcasting station in East St. Louis, Ill., Mr. Henry formally applied to surrender his license to practice law in Missouri and have his name stricken from the roll of attorneys admitted to practice in that State. Five months later, in September of 1940, the bar committee filed a petition in the Supreme Court of Missouri, reciting that no disbarment proceeding was pending and recommending that Mr. Henry's application be accepted. On the same day the petition was filed, the court issued a summary order accepting the surrender of license, striking Mr. Henry's name from the rolls and adding—without any stated reason—"that he be, and is hereby, disbarred from the practice of law in this State" (WHDH exhibit 7; Tr. 1352, 1694–1695).

In January of 1941, the U.S. attorney petitioned the Federal District Court for the Eastern District of Missouri to strike Mr. Henry's name from the roll of attorneys practicing before it; the petition was based in part upon the action of the State court (which was described as an acceptance of the surrender of license, without any reference to the court's "disbarment" language) and in part upon specific allegations of misconduct. Mr. Henry filed a perfunctory response, which denied the allegations of misconduct but interposed no objection to the grant of the petition, since admission to the Federal court was "based upon * * * a prior admission as a member of the Bar of the Supreme Court of the State of Missouri. * * *" The Federal court thereupon struck his name from its rolls (WHDH exhibit 8).

At the comparative hearing, Mr. Henry was asked whether he had ever been disbarred; this he initially denied and then—on his own

[8] For some time after leaving the law, Mr. Henry continued to use his given name, despite the fact that he continued to live in St. Louis, where it might be expected that his legal experience would be known. Like others in broadcasting, however, he selected a name "to be used on the air," consisting—in his case—of his given middle name, "Henry," and his grandfather's first name, "Michael" (Tr. 1696). In 1947, when he was assistant station manager of station WTMV, East St. Louis, Ill., he filed a formal motion for change of name, since he was widely known in radio circles as "Michael Henry" and signed checks as station manager in that name (Tr. 1697). This change of name and the fact that he had been a lawyer were disclosed to his Greater Boston associates (Tr. 1351-1354; 22 FCC at 783, fn. 19).

[9] The 1957 decision—here reaffirmed—disclaims any concern with the professional misconduct involved; while reserving a question as to Mr. Henry's candor, it otherwise agrees with the examiner's conclusion that "it is clear from this man's record of performance over the past 15 years, as may be determined from the record herein, that he may be relied upon to fulfill his obligations as a citizen and to carry out his responsibilities to the public as the supervisor of a television broadcast station" (22 FCC at 880, 881).

and before any further questions were asked—explained his answer by stating that he had surrendered his license to practice law in the State of Missouri but had not been disbarred. He was also asked whether he had been disbarred in the "Federal court in St. Louis," and replied that he knew of no such proceeding (Tr. 1290). Two days later, the records of the 1940 and 1941 proceedings in the Supreme Court of Missouri and the Federal district court were produced, and Mr. Henry took the stand again. On this occasion, he stated that he had not been aware of the State court's final order and that he had forgotten the Federal proceeding (Tr. 1695).

Overriding the examiner, the majority finds it incredible that Mr. Henry did not ascertain the final result of his application for surrender of license with precision. I do not see why it is not equally reasonable to credit his statement. At the time the State court's order was issued, his law office had been closed and he had been out of the practice for about 2 years. He had undertaken a new career in broadcasting and had, 5 months previously, signed an application to surrender his license—at the suggestion and with the evident approval of the bar committee (Tr. 1695). There is no indication in our record that the bar committee's petition to the State court or the State court's order was served upon him; since the entire matter would remind him of a painful passage in his life, a lack of inclination to probe it on his own motion would certainly be understandable.[10] Moreover, if he had seen the State court's order, it is difficult to perceive any motive to lie about it 15 years later. As the Commission found, "it was * * * apparent [from the outset] the one conducting the cross-examination had knowledge of the facts" (22 FCC at 880) and had looked to the court records.

The majority also finds "false testimony" in Mr. Henry's statement that he knew of no Federal court disbarment proceedings, when in fact he had, in 1941, signed a return to an order to show cause in the Federal court. But even in 1941 he thought that the Federal proceeding was "redundant and unnecessary," in view of his prior surrender of his State license (WHDH exhibit 8). I see nothing inherently incredible in his statement, some 14 years later, that he had completely forgotten about this proceeding. Indeed, after the passage of so much time, he did not properly recall the State proceeding, which he described as occurring in the "Circuit Court of St. Louis," instead of the Supreme Court of Missouri (Tr. 1290). There was, moreover, no reason whatever for him to acknowledge the surrender of his State license and then seek to conceal the derivative and, in his opinion, "redundant" Federal proceeding.

Notwithstanding all this, Mr. Henry's candor is still subject to question on the ground that the written biography which he submitted as a part of the Greater Boston affirmative case, while listing his activities in broadcasting from 1939 to 1954, made no reference to his prior legal practice or to his loss of license (Greater Boston exhibit

[10] In describing what had happened to his State license in his 1941 response in the Federal court, Mr. Henry stated that he had "surrendered his license to practice in the courts of the State of Missouri"—a statement wholly consistent with his later testimony and strongly indicating that he had not inspected the State court's order, only a few months after its issuance (WHDH exhibit 8).

Y). I think it fair to say that his disinclination to go into the matter unless specifically questioned does not meet the rigorous standards that should be applied. But it is also fair to say that Mr. Henry's omission violated no requirement of the Commission's rules which leave the information to be covered by such a statement to the judgment of the individual submitting it.[11]

Let us compare this "lack of candor" of Mr. Henry to the conduct of Mr. Choate, and particularly his answers to some questions on a subject much more clearly and directly in issue.

Mr. Choate was asked several times what his "specific purpose" was in arranging his meetings with Chairman McConnaughey (Tr. 3463; see also Tr. 3350, 3355, 3376, 3442). His replies, e.g., that he had no "specific purpose" in mind, that the first luncheon meeting was "purely social" or to "size up" McConnaughey and that the second was to discuss legislation, were not fully credited by the Commission. Instead, the Commission found "no persuasive explanation of why Choate felt it necessary to seek a personal relationship with McConnaughey," or "why Choate, who is not shown to be a specialist in communications law, should consider himself, rather than the draftsman of the proposed legislation or some other experienced counsel, to be the proper person to present a brief on so technical and complex a subject." The Commission found further that it "could not have escaped Choate's attention that the subject of the legislation was an important issue in the pending adjudicatory proceeding," and that Choate could not "have believed that McConnaughey might read such a brief without perceiving the pertinence of its arguments to the disposition of the Boston case" (29 FCC at 211-212). And the Commission found expressly that Mr. Choate had not made "a full disclosure of his motives" (29 FCC at 211).

The majority ignores these findings today.

And the majority ignores something even more important. Assuming that the conduct of Mr. Choate and Mr. Henry can reasonably be equated, it does not follow that the demerits are equal in view of the roles which the two men play in their respective organizations. Mr. Henry is, of course, a significant figure in Greater Boston "as vice president, director, and general manager" (22 FCC at 865); but he is 1 of some 35 shareholders and not the principal figure in the organization. As the Commission found, the "basic control" of Greater Boston is in the stockholders, who "will establish the basic policies of the corporation" in monthly meetings, while the board of directors will meet once a week to implement those policies (22 FCC at 785).[12]

[11] Mr. Henry fully answered all of the questions in the Commission's application form pertaining to him. The form seeks specific information on past revocations of station licenses by court order, criminal convictions of various kinds, bankruptcy proceedings, and unsatisfied judgments or decrees; it also requests general information on occupation and business interests at the time of filing and during the 5 years immediately prior to filing. It makes no inquiry as to the loss of any professional license and contains no general requirement that an applicant disclose any and every discreditable event in his remote past.

[12] It is unnecessary, for present purposes, to determine the relative importance of Mr. Clark's role in the Massachusetts Bay applicant. Mr. Clark's approach to Chairman McConnaughey was undertaken at the request of the Massachusetts Bay board (Tr. 3630-3631). His description of the board's purposes—like his description of his own purposes—disavowed any improper intent to influence the comparative decision. However, the Commission found his testimony incredible in this respect (29 FCC at 212-213), and its reasoning applies with equal force to the purposes of the applicant's board. Hence, the applicant as a whole must be considered responsible for his improper mission.

Mr. Choate, on the other hand, is *the* dominate figure in WHDH—indeed, for all practical purposes, he is the applicant. As president of WHDH and publisher of its parent newspaper, Mr. Choate is the "focal point between the [parent corporation] and the management of the applicant" (22 FCC at 865). He executes the general policy for the broadcast operations and makes specific policy decisions, none of which has ever been questioned by the board of directors of the parent newspaper.[13] Moreover, he "assumes the entire responsibility for the selection of personnel and the choice of programing" (22 FCC at 771–772).

The majority acknowledges that Mr. Choate is the "principal figure" of WHDH, and that Mr. Henry is not such a figure in Greater Boston. For it has reaffirmed its conclusion, on integration of ownership with management, that WHDH and Massachusetts Bay are preferable to Greater Boston because "there is a greater demonstration that the principal figures of the applicants [Mr. Choate, for WHDH; Mr. Steinert, for Massachusetts Bay] will be participating" (22 FCC at 866). There can hardly be any doubt that, as general manager of the proposed station, Mr. Henry "will be participating"; but the majority does not consider him "a principal figure."

Mr. Choate's much greater importance to WHDH requires that the demerit assessed against WHDH be correspondingly greater. To give one example—integration of ownership with management—the majority adheres to its preference for WHDH over Greater Boston even though the entire WHDH showing rests on Mr. Choate, the party found to be guilty of most serious misconduct. If Mr. Choate and Mr. Henry are both eliminated or the significance of their participation is severely downgraded because of their respective improper acts, WHDH is left with no showing—Greater Boston with the integration of a 2.77-percent stockholder as commercial manager. At the very least, any superiority which WHDH was previously thought to enjoy must disappear.[14]

The same kind of reevaluation is required in assessing the factors of broadcast experience and past broadcast record. The majority draws from these factors a critically important assurance that WHDH may be relied upon to carry out its proposals and remain sensitive to the needs of its community (22 FCC at 861–864, 881–882; majority opinion, pars. 13, 16). But again the record and experience involved and relied upon are largely those of one person, Mr. Choate.

When it fails to make these reevaluations, the majority effectively fails to take account of the 1960 decision. But it cannot have it both ways; it cannot place great reliance on the fact that Mr. Choate is the "principal figure" and "focal point" of WHDH in awarding preferences to that applicant and then ignore his dominant role in evaluating the weight to be attached to his misconduct. Clearly, Mr. Choate's demerit goes to the heart of the entire WHDH application, just because

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[13] It is illustrative that Mr. Choate made the decision to file the WHDH television application (Tr. 3493, 3498-3500—a decision Mr. Henry could not have made for Greater Boston.

[14] Here, again, it is unnecessary to dwell upon the integration showing of Massachusetts Bay. For that showing rests primarily upon the participation of Mr. Steinert as president of the applicant, and Mr. Steinert clearly authorized Mr. Clark's improper mission (Tr. 3630).

he himself is so important a figure in the application. Just as clearly, the same cannot be said of Mr. Henry and Greater Boston.

In sum, the majority opinion avoids any meaningful consideration of the misconduct found in the 1960 decision—and disregards it in reassessing the 1957 comparison. But this is made possible only by the majority's equation of the conduct of Mr. Henry with that of Mr. Choate and Mr. Clark. Only by making the offenses of Party A equal the offenses of Party B, which in turn equal the offenses of Party C, can the majority make the offenses of no party material to the ultimate comparison. This equation simply does not balance.

III. *The "conventional criteria"*

The majority's selection of WHDH also rests on its determination that WHDH is superior in terms of the standard criteria which the Commission applies in comparative cases. I must disagree with this determination on its own terms. In any event, the "conventional criteria" must be applied in a manner which takes account of the misconduct found in the Commission's 1960 decision. So applied, they cannot support a grant to WHDH.

Under established Commission policy, the fact that WHDH operates a 50-kw standard broadcast station and an FM station in Boston, and is itself wholly owned by the Herald-Traveler Corp., which publishes two prominent daily newspapers in Boston, renders it—other things being equal—a less desirable licensee for the third commercial VHF television channel in Boston than other applicants who do not have the same association with existing mass media in the area (FCC Public Notice, 9 Fed. Reg. 702, 703 (1944)); *Scripps-Howard Radio, Inc.*, v. *F.C.C.*, 189 F. 2d 677 (C.A.D.C.); *McClatchy Broadcasting Co.* v. *F.C.C.*, 239 F. 2d 15 (C.A.D.C.). The majority concedes this much, stating that Greater Boston and Massachusetts Bay are entitled to "substantial preference" on this factor. It goes on to say, however, that the significance of the preference is "diluted" by "the very extensive numbers of newspapers, as well as AM, FM, and television stations unassociated with the applicants" in the area to be served. Since WHDH and its parent corporation control only "a minor fraction of such outlets," the majority believes that the "diversity" factor has "far less" impact and is "of greatly diminished significance in the circumstances of this case."

The majority has seriously mistaken the number of such competing media in this case. Its statement concerning "extensive numbers of newspapers" presumably refers to the 1957 finding—here reaffirmed without change—that the Herald-Traveler operates but two out of eight daily newspapers which served Boston at the time the case was originally designated for hearing (22 FCC at 769, 776, 877). The 1957 decision recognized that one of the six dailies competing with the Herald-Traveler newspaper had ceased circulation after the closing of the comparative record (22 FCC at 877). But neither the 1957 decision nor the majority's present order acknowledges the fact that the remaining "five" competitors consist of the morning and evening Globe, the morning and evening Record-American, and the Christian Science Monitor (Tr. 974–975, 985–986).

The Herald-Traveler thus faces three—not six—local competitors in the daily newspaper field, and only two of the three compete for the same general readership and advertising market.[15] When this fact is acknowledged, there is no basis for minimizing the significance of WHDH's disadvantage on diversification. In *Tampa Times Co.* (10 Pike & Fischer, R.R. 77, 85, 138–139), there were 18 AM stations and 7 daily newspapers (3 with small circulation) serving the area; the Commission did not view the diversification disadvantage of the Times as "of greatly diminished significance" or having "far less impact." Nor did it employ such terms in *Scripps-Howard Radio, Inc.* (4 Pike & Fischer, R.R. 525, 554), where there were five AM stations, three daily newspapers, and a large number of other publications in the area. See *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 189 F. 2d 677, 683 (C.A.D.C.).

There are features of this case which make diversification a matter of heightened, rather than diminished, significance. The Herald-Traveler papers accept advertising only upon a combined rate basis, and time on WHDH has been sold in combination with space in the Herald and Traveler (22 FCC at 776, 778). WHDH enjoys special privileges in obtaining advertising and the printing of its logs in the Herald-Traveler papers, and the newspapers enjoy reciprocal advantages through promotional announcements carried over the radio stations without charge (22 FCC at 777–778). Station personnel have been instructed to identify WHDH at station breaks as the Herald-Traveler station, and news broadcasts are identified as "Herald News" and "Traveler News." Mr. Choate "testified that there is a policy of mutual promotion between the newspapers and the radio station, and that the programing of the television station will be adapted to the best possible promotion of the Herald-Traveler where it is feasible to do so" (22 FCC at 777; Tr. 672).

Practices of this kind place Herald-Traveler rivals in the newspaper and broadcasting fields, who do not enjoy similar opportunities, at a competitive disadvantage. Cf., *Philco Corp.* v. *F.C.C.*, 257 F. 2d 656; 293 F. 2d 864 (C.A.D.C.). In view of the finding that the Herald-Traveler has long led other Boston papers in advertising lineage (22 FCC at 776), there is reason for serious concern with the impact of such practices upon free and open competition. It is no answer to state that such practices are not so serious as to be disqualifying; in a comparative context, they must weigh most significantly against WHDH.

When the diversification factor is thus evaluated, it is difficult to understand how the countervailing factors upon which the majority relies may be thought to outweigh it. Although WHDH enjoys some advantage on program planning, the program proposals of all parties are found to be equal; WHDH prevails essentially because of its

[15] Similarly, WHDH operates one of three 50-kw AM stations in Boston (22 FCC at 770, 877); none of the remaining 14 AM stations in the area (as of 1957) was authorized to employ more than 5 kw, and 7 of the 14 were authorized to operate daytime only (22 FCC at 770). Moreover, while WHDH operates but 1 of 10 FM stations in the area, 5 of the remaining 9 appear to be under common ownership with AM or TV facilities in the area (22 FCC at 770); the record does not show how many of these follow WHDH-FM in duplicating the program service of AM counterparts.

preferences on broadcast experience and past broadcast record—factors chiefly concerned with the likelihood that proposals will be carried out. But as the court has aptly stated, when experience springs from a dominant position among existing media, its importance as against the relatively lesser experience of those who would bring fresh blood to the field "is not so obvious." *Sunbeam Television Corp. v. F.C.C.*, 243 F. 2d 26, 29 (C.A.D.C.). For "lack of experience is cured with time," but "lack of diversification is not." (Ibid.)

On this phase of the case, I agree with Commissioner Hyde's 1957 conclusion that the "public interest, convenience, and necessity would be served best by selecting an applicant which would offer a higher degree of diversification" (22 FCC at 883). But the question of whether selection of WHDH was correct in 1957 is academic; today's decision must be grounded on today's record. So considered, the assurance of superior reliability which the majority draws from the experience and record of WHDH is seriously diminished by the conduct of Mr. Choate. Such assurance cannot outweigh both the purposes of the diversification policy and the harm done by a grant which informs those who deal with us that an applicant may tamper with our processes and still prevail over a qualified competitor who has not.

For all these reasons I am persuaded that the public interest is not well served by the action the Commission takes today. As I stated at the outset, I would reopen the record now to new applicants and conduct an expedited hearing looking to the early resolution of this already far too prolonged proceeding. However, the majority, by granting only a 4 months' license to WHDH, does provide the opportunity for the filing of competing applications at an early date. So far as I am concerned, the existing temporary licensee will not enjoy a preferred position in any such proceeding.

CONCURRING STATEMENT OF COMMISSIONER FREDERICK W. FORD

I concur in the result. Since I do not entirely agree with the body of the opinion, some amplification of my views seems in order.

It was with great reluctance that I originally disagreed with Judge Stern's initial decision in this case, in which he found "not a shred of credible evidence" indicating culpable misconduct by Robert Choate of WHDH. I concluded at the time that the broader administrative responsibilities resting on the Commission required us to consider the conduct of Mr. Choate as a factor for comparative consideration in the proceeding in which the conduct took place, even though it was not disqualifying. Accordingly, I approved the Commission's decision of July 14, 1960, and the subsequent recommendation that the case be remanded.

In building a body of precedent governing the conduct of applicants in contested cases, comparative consideration must be given to any conduct of such applicants which places Commissioners in situations which give the appearance of permitting special pleading in the quasi-judicial proceedings in which they participate. We must achieve, for administrative tribunals, the same degree of rectitude and objectiveness attributed to the courts by our people, thus further in-

spiring confidence in our democratic concept of due process of law. This, I consider to be an overriding national policy in the public interest. To obtain this objective is most difficult in the administrative field because here judicial functions are combined with legislative and executive functions, where less stringent standards necessarily apply in our contacts with those we regulate. A subject of proper discussion by Commissioners with those we regulate in legislative or executive matters may be improper in quasi-judicial matters. The line dividing these functions is sometimes difficult to draw. Nevertheless, it must be drawn, as Chairman McConnaughey did here where the point involved in the legislation was similar to that involved in the quasi-judicial matter.

In our decision of July 14, 1960, which was stayed by the court and later incorporated in our "report and recommendation" to the court, we concluded from two lunches about a year apart at the second of which an offer of a memorandum on legislation pending in Congress was made to Chairman McConnaughey by Mr. Choate, and a later invitation to Chairman McConnaughey to attend a large banquet which was declined, that Mr. Choate attempted to establish a personal relationship with Chairman McConnaughey with the hope of creating a favorable bias in his mind which might operate in favor of WHDH, even though at no time were the merits of this case discussed. Upon further study of this record pursuant to the court's mandate to reevaluate the case in the light of the supplemented record, I find this conclusion to be unwarranted. I cannot conceive of an applicant of Mr. Choate's age, background, and experience believing that two lunches and an invitation to a large banquet would establish a personal relationship with a Commissioner which would influence his vote. As Judge Stern concluded, there is no evidence that this was the case, and it would take considerably more than the isolated contacts found in this record to support such an inference. The gravamen of the offense here was not a culpable attempt to establish a favorable relationship with a Commissioner, but an ill-advised effort to present a legislative matter which overlapped a quasi-judicial matter. This was improper under the circumstances and constituted an error in judgment which must be weighed as a comparative factor, even though this was done on the advice of counsel. I am satisfied, however, that it did not involve a deficiency in Mr. Choate's character or significantly affect his qualifications to be a licensee of the Commission.

Having considered and approved the findings of the Commission with respect to Mr. Henry's false testimony and the finding of Judge Stern concerning the fact that Mr. Clark "may have stepped somewhat out of bounds in the presentation he made to McConnaughey on the merits of his associates," I must conclude on a comparative basis that the conduct of Mr. Choate does not affect adversely the conclusion of the Commission in its 1957 decision that the grant of the application of WHDH would best serve the public interest, convenience, and necessity.

The Commission has determined that a short-term license should be issued. Since WHDH has already been on the air for a period of time

longer than the normal license term, I feel that such action is not inappropriate here.

CONCURRING STATEMENT OF COMMISSIONER CROSS

I concur in the decision of the majority to award a 4-month license to WHDH. I do so, however, mainly to finalize this case which has been pending for so long.

Under the present posture of this case, we have only three applicants to choose from. Two of these (WHDH and Massachusetts Bay) have each been assessed a demerit by the Commission for attempted ex parte activities; the third, Greater Boston, has been assessed a demerit because one of its officers, who is also its principal operating official, gave false testimony in the record of this proceeding. Under these circumstances, and since the Commission's previous order of April 24, 1957 (which granted WHDH), has been vacated by the court, I would have preferred to request the court's permission to start a new proceeding in an effort to obtain the best qualified applicant—affording a reasonable time for the filing of new applications or for amending the existing applications if the parties elected to do so. Moreover, while this new proceeding was in progress, I would have allowed WHDH to continue operating in order that the people in the Boston area would not be deprived of service on channel 5.

By concurring in the majority opinion, I am admittedly making a Hobson's choice in favor of the least undesirable of the three demerited applicants. However, WHDH is being granted only a 4-month license, after which time there will be an opportunity for other applicants to file against the WHDH renewal. The majority opinion therefore, while not entirely meeting my views, does go a long way in doing so; i.e., it maintains service on channel 5 for the people in the Boston area and it also provides an opportunity for new applications to be filed after 4 months. Moreover, it finalizes this long-standing proceeding. Under these circumstances, I consider the public interest will be served and accordingly concur in the majority decision.

5. FCC Decision Adopted March 13, 1963, Released March 15, 1963 (34 FCC 537)

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D.C.

In the Matter of WHDH, INC., BOSTON, MASS.	Docket No. 8739 File No. BPCT-248
GREATER BOSTON TELEVISION CORP., BOSTON, MASS.	Docket No. 11070 File No. BPCT-1657
MASSACHUSETTS BAY TELECASTERS, INC., BOSTON, MASS.	Docket No. 11072 File No. BPCT-1844
For Construction Permits for New Television Stations (Channel 5)	

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1963)

BY THE COMMISSION: CHAIRMAN MINOW DISSENTING; COMMISSIONERS HYDE AND FORD CONCURRING AND ISSUING STATEMENTS; COMMISSIONERS BARTLEY, CRAVEN, AND HENRY NOT PARTICIPATING.

1. Greater Boston Television Corp. (Greater Boston) filed on October 26, 1962, a petition for reconsideration of the Commission's decision and order in the above-captioned proceeding which was released on September 26, 1962.[1] Massachusetts Bay Telecasters, Inc., filed a statement with respect to such petition on October 26, 1962, and WHDH, Inc. (WHDH), has opposed the petition in its pleading filed November 8, 1962.

2. Among the arguments advanced by Greater Boston is one that relates to the Commission's conclusion that, upon weighing certain actions of principals of WHDH and Greater Boston determined to be contrary to basic tenets of the adjudicatory process, no justification exists for assessing a larger demerit against one applicant than the other. In the instance of Mr. Choate, a principal of WHDH, the action found to be adverse to the applicant involved an attempt to establish a personal relationship with an adjudicatory officer in the hope that the decision would be influenced, while Mr. Henry's activity which reflected adversely on Greater Boston involved an attempt to

[1] 33 FCC 449, 24 R.R. 255.

conceal facts by giving untrue testimony. Greater Boston argues that the activities of Mr. Choate and Mr. Henry not only "differ in nature," as found by the Commission, but also differ in seriousness, in the threat which they pose to the integrity of the adjudicatory process, and in the weight which should be accorded to them in this case. It is stated that it is unreasonable to say that the activities cancel each other out, and that it is wrong to equate the conduct of Choate and Henry. Regarding the activities of Henry, Greater Boston submits that his conduct "seems to get worse with the passage of years"; that the hearing examiner attached no significance to it, not even regarding the testimony as untrue; that in the Commission's 1957 decision Henry's testimony was written up as a lack of candor; and that "[n]ow that WHDH has suffered a serious demerit, it has become necessary to describe Henry's testimony in more lurid terms in order that a decision for WHDH may be made to sound plausible."

3. Before proceeding further with Greater Boston's contentions, it is advisable to put the Henry activities in their proper perspective. It was within the competence and discretion of the Commission to disagree with its examiner's conclusions in this area. It evaluated the facts differently, noting that the Commission is in the position of having to rely in its regulatory functions upon full and frank disclosure by its licensees and must require complete candor on their part. The lack of candor found to exist on the part of Henry in the Commission's 1957 decision stemmed from a failure to disclose a disbarment proceeding and from less-than-candid testimony at the hearing when the disbarment matter was inquired into. As indicated in the 1957 decision and again in the 1962 decision, Henry's lack of candor results in a comparative demerit in evaluating Greater Boston as an applicant in the proceeding. That Henry's activities are of a serious nature is pointed up by the language of the U.S. Court of Appeals for the District of Columbia Circuit when the appeal of the 1957 decision in this proceeding was before that body.[2] Referring to the Commission's conclusions in the Henry matter, the court stated:

> That such misrepresentation and concealment of important and relevant information should be received and should be given substantial weight, we have no doubt.

4. Against this background, the Commission cannot agree with Greater Boston that in its 1962 decision "* * * it has become necessary to describe Henry's testimony in more lurid terms in order that a decision for WHDH may be made to sound plausible." Nor in the circumstances noted can we agree that the activities of Choate and Henry differ in seriousness, and in the threat which they pose to the integrity of the adjudicatory process. The Commission regards the activities of both individuals as serious in nature, and both activities threaten the integrity of the adjudicatory process in equal degree. That this is so is reflected in our consideration given to the activities of Henry in the 1957 decision, to Choate's activities reflected in our July 1960 decision, and to the activities of both as discussed in the 1962

[2] *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55.

decision wherein we concluded that no justification exists for assessing a larger demerit against one applicant than the other.[3]

5. In another argument Greater Boston suggests that Henry is less important to the Greater Boston applicant than Choate may be to WHDH, attempting it would appear to lessen the comparative demerit assessed against Greater Boston. The argument runs that while Henry is important to the Greater Boston applicant in the sense that he was hired to serve as an experienced manager, he is not important as a corporate officer or as a key member of the Greater Boston applicant. We cannot agree that Henry is not important to Greater Boston in the latter connections. On the contrary, Henry would have a prominent role in the operation proposed by Greater Boston. The findings of the 1957 decision indicate that Henry is vice president, a director, and a 2.77-percent stockholder.[4] In addition, Henry is proposed as general manager of the station, and was active in the preparation of the applicant's program plans and the descriptions of the proposed programs. Moreover, Henry's importance to the Greater Boston applicant is further demonstrated by the following facts: Henry would devote full time to the station and is one of only two stockholders proposed for integration; as general manager, a stockholder, and director, Henry will participate in all meetings of these bodies and will act as liaison between the stockholders and directors and the department heads and members of the staff; and he will report to the stockholders at the monthly meetings on all phases of station operation.

6. Greater Boston argues that in addition to the fact that the 1962 decision enjoys the affirmative support of only three present members of the Commission,[5] the Commission has rejected the view of the case urged upon it by the Attorney General and by its own Broadcast Bureau without citing a single legal precedent. In this connection, it is suggested that the Commission owes it to the parties and to the court of appeals to spread its views on the record with respect to *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, and *WKAT, Inc.* v. *FCC*, C.A.D.C., July 6, 1961. Extensive discussion is unnecessary regarding these arguments. The 1962 decision was validly entered; it is of no significance at this juncture that the decision

[3] Greater Boston argues also that in the July 1960 decision, Choate was said not to have given a full disclosure of his motives when he testified that his reason for the initial meeting with former Chairman McConnaughey was to "size up" the new Chairman, the Commission concluding that Choate wished to afford the Chairman an opportunity to "size him up." Greater Boston submits that the 1962 decision makes no effort to ascertain why lack of candor on Henry's part is worse than lack of candor on Choate's part. The short answer to this contention is that Henry gave false testimony, while Choate's testimony has never been so characterized.

[4] The basic control of Greater Boston is vested in 36 equal stockholders, and the policy of the corporation is that the various stockholders shall own the same amount of stock.

[5] Greater Boston also argues that the position taken by Commissioner Hyde in the 1962 decision constitutes arbitrary and capricious action on his part because he dissented from the 1957 decision and offered no explanation in connection with his 1962 vote for WHDH. Initially, it should be noted that the dissent of Commissioner Hyde to the 1957 decision does not, as Greater Boston asserts, indicate that Greater Boston, rather than one of the other applicants, would have been preferred over WHDH by Commissioner Hyde. In this connection, the pertinent part of Commissioner Hyde's dissent reads: "In view of the choices available in this proceeding on the basis of the evidence, I am convinced that public interest, convenience, and necessity would be served best by selecting an applicant which would offer a higher degree of diversification." Commissioner Hyde joined in the 1962 decision of the majority which adequately sets forth the basis for the Commission's judgment that a 4-month grant to WHDH is in the public interest. We do not believe that any further explanation is necessary or that Commissioner Hyde's vote is open to challenge. See *Pinellas Broadcasting Co.* v. *Federal Communications Commission*, 97 U.S. App. D.C. 236, 238, 230 F. 2d 204, 206, cert. den. 350 U.S. 1007.

"enjoys the affirmative support of only three present members of the Commission." As to rejection of the view of the case urged by the Attorney General and the Broadcast Bureau, this is indeed within the prerogative of the Commission in its ultimate evaluation of the facts and in the exercise of its judgment. While the *Root* and *WKAT* cases may have been cited to the Commission in support of the Bureau's and the Attorney General's position, no reason appears why in the Commission's judgment it need "spread its views on the record" respecting these cases. Nor is the 1962 decision deficient in that it cites no legal precedent. The Commission's reasoning is clearly and succinctly set forth, and its decision to cite no cases in no way inhibits the exercise of available procedures by Greater Boston.

7. It is stated also that it would be helpful if the other members of the Commission were to address themselves to the questions raised in Chairman Minow's dissent. We think that this is wholly unnecessary; to do so would establish an undesirable precedent in the context of our adjudicatory proceedings. It is any Commissioner's prerogative to dissent from an action taken by the members affirmatively. But it does not follow that those members who form the majority in the action taken must address themselves point by point to the dissenting member's views. Typical of the administrative process, the language of the majority opinion must be left to speak for itself, and so with a dissenting member's language.

8. Finally, Greater Boston requests that its petition for reconsideration be set down for oral argument. We do not think that any useful purpose would be served by hearing oral argument in this connection. Together with other matters of record in this proceeding, petitioner's contentions have been adequately set forth in the instant petition for reconsideration to permit determination thereof without assistance of oral argument.

9. In view of the foregoing, *It is ordered*, This 13th day of March 1963, that the petition for reconsideration filed by Greater Boston Television Corp. on October 26, 1962, *Is denied.*

CONCURRING STATEMENT OF COMMISSIONER ROSEL H. HYDE

In dissenting from the 1957 decision of the Commission, I stated that the "reasoning on which the decision is based does not seem valid and, therefore, I am unable to concur in the result reached by the majority." The court of appeals ruled that the "Commission's policy as explained and applied in this case" is "quite within the Commission's competence," though the matter is one on which reasonable men may differ. *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 104 U.S. App. D.C. 226, 235, 261 F. 2d 55, 64. I have reevaluated the comparative merits of the applicants in light of the record as supplemented. It is my judgment that under the circumstances a 4-month grant to WHDH is in the public interest for the reasons stated in the Commission's decision of September 25, 1962.

SEPARATE STATEMENT OF COMMISSIONER FREDERICK W. FORD

Since the petitioner has challenged the basis for my concurring opinion in this case, a separate statement at this time seems appropriate.

It is argued that the holdings of July 14, 1960, adverse to Choate are "conclusions of the Commission [which] have been adopted by the court" and are, therefore, the law of the case. Any final decision states the petitioner must, rightly or wrongly, assume that Choate sought to influence the outcome of the comparative case by improper means.

Contrary to petitioner's assertion, the merits of the July 14, 1960, decision and our subsequent report and recommendation to the court have not yet been judicially reviewed. Instead, by an interlocutory order "in which the court itself has not passed upon the evidence or the findings," [6] the case was remanded so that the Commission could "reevaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission shall deem appropriate." [7]

The posture of the case is unique; however, with the correctness of the findings regarding Choate's conduct still undecided and subject to appellate review, I fail to see how they can be regarded as "the law of the case." Cf. *Atchison* v. *Ballard*, 108 F. 2d 768, 772. The paramount consideration at this point, it seems to me, is that our final action prior to judicial review should reflect the best judgment of the Commission on the record as a whole. Departing from a prior determination is ordinarily to be avoided in the interests of finality and orderly procedure. But if the ends of justice require that an earlier finding be modified—as in my judgment they do here—the terms of our mandate appear broad enough to allow such a course.

Accordingly, I adhere to the view expressed in my concurring statement that the gravamen of Choate's offense was his effort to discuss a legislative matter which also related to one of the issues in the comparative proceeding. While this action would not have been improper in other circumstances, the pendency of the comparative case made it ill-advised and subject to criticism here. In my view, however, the record does not establish a calculated or deliberate attempt to influence the outcome of the case by other than the accepted methods of adjudication.

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[6] Solicitor General's brief for the Federal Communications Commission in Opposition to Petition for Writ of Certiorari, p. 13.

[7] *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, order of Jan. 19, 1961, 20 R.R. 2096a.

APPENDIX E

FCC Policy Statement on Comparative Broadcast Hearings, July 28, 1965 (1 FCC 2d 393)

COMPARATIVE BROADCAST HEARINGS

FCC 65-689
71120

Policy Statement on Comparative Broadcast Hearings

Adopted: July 28, 1965

Released: July 28, 1965

PUBLIC NOTICE

By the Commission: (Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee concurring and issuing a statement).

One of the Commission's primary responsibilities is to choose among qualified new applicants for the same broadcast facilities.[1] This commonly requires extended hearings into a number of areas of comparison. The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.

Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, Federal Communications

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[1] This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.

Commission v. WOKO, Inc., 329 US 223, 228,[2] and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. Pinellas Broadcasting Co. v. Federal Communications Commission, 97 US App DC 236, 230 F2d 204 [13 RR 2058], cert. den. 350 US 1007.

All this being so, it is nonetheless important to have a high degree of consistency of decision and of clarity in our basic policies. It is also obviously of great importance to prevent undue delay in the disposition of comparative hearing cases. A general review of the criteria governing the disposition of comparative broadcast hearings will, we believe, be useful to parties appearing before the Commission. It should also be of value to the Examiners who initially decide the cases and to the Review Board to which the basic review of Examiners' decisions in this area has been delegated. See § 0.365 of our Rules, 47 CFR § 0.365.[3]

This statement is issued to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest. We recognize, of course, that a general statement cannot dispose of all problems or decide cases in advance. Thus, for example, a case where a party proposes a specialized service will have to be given somewhat different consideration. Difficult cases will remain difficult. Our purpose is to promote stability of judgment without foreclosing the right of every applicant to a full hearing.

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[2] "[T]he doctrine of stare decisis is not generally applicable to the decisions of administrative tribunals," Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 US App DC 383, 385, 174 F2d 38, 40 [4 RR 2126].

[3] On June 15, 1964 the rule was amended to give the Review Board authority to review Initial Decisions of Hearing Examiners in comparative television cases, a function formerly performed only by the Commission itself.

We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.[4] Equally basic is a broadcast service which meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.

Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated.

1. *Diversification of control of the media of mass communications.* Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.

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[4] As the Supreme Court has stated, the First Amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," Associted Press v. United States, 326 US 1, 20. That radio and television broadcast stations play an important role in providing news and opinion is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established. United States v. Storer Broadcasting Co., 351 US 192 [13 RR 2161]; Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 US App DC 13, 189 F2d 677 [7 RR 2001], cert. den. 342 US 830.

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance, followed by other interests in the remainder of the proposed service area [5] and, finally, generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements which we believe significant. Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant in the degree that they:

(A) are larger, i.e., go towards complete ownership and control; and to the degree that the existing media:

(B) are in, or close to, the community being applied for;

(C) are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;

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[5] Sections 73.35(a), 73.240(a)(1) and 73.636(a)(1) of our rules, 47 CFR §§ 73.35(a), 73.240(a)(1), 73.636(a)(1), prohibit common control of stations in the same service (AM, FM and TV) within prescribed overlap areas. Less than controlling ownership interests and significant managerial positions in stations and other media within and without such areas will be considered when held by persons with any ownership or significant managerial interest in an applicant.

(D) are significant in terms of regional or national coverage; and

(E) are significant with respect to other media in their respective localities.

2. *Full-time participation in station operation by owners.* We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service.[6] It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis. In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional

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[6] As with other proposals, it is important that integration proposals be adhered to on a permanent basis. See Tidewater Teleradio, Inc., 24 Pike & Fischer RR 653.

significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs.[7] Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since ex-

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[7] Of course, full-time participation is also necessarily accompanied by residence in the area.

perience generally confers only an initial advantage,[8] it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time, participation in station operation by those with ownership interests. We recognize that station ownership by those who are local residents and, to a markedly lesser degree, by those who have broadcasting experience, may still be of some value even where there is not the substantial participation to which we will accord weight under this heading. Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs, and a very slight credit will similarly be given for experience not accompanied by full-time participation. Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to any use in the operation of the station.

3. *Proposed program service.* The United States Court of Appeals for the District of Columbia Circuit has stated that, "in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service."

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[8] Lack of experience, unlike a high concentration of control, is remediable. See Sunbeam Television Corp. v. Federal Communications Commission, 100 US App DC 82, 243 F2d 26 [15 RR 2001].

Johnston Broadcasting Co. v. Federal Communications Commission, 85 US App DC 40, 48, 175 F2d 351, 359 [4 RR 2138]. The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programming Inquiry," 25 FR 7291, 20 Pike & Fischer RR 1901, and need not be repeated here.[9] And the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See Henry v. Federal Communications Commission, 112 US App DC 257, 302 F2d 191 [23 RR 2016], cert. den. 371 US 821. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. See Johnston Broadcasting Co. v. Federal Communications Commission, 85 US App DC 40, 175 F2d 351. Minor differences in the proportions of time allocated to different types of programs will not be considered. Sub-

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[9] Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.

stantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need, may still be urged. We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated.[10]

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every licensee to carry out its proposals, subject to factors beyond its control, and subject to reasonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any

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[10] We will similarly not give independent consideration to proposed studios or other equipment. These are also elements of a proposed operation which are necessary to carry out the program plans, and which are expected to be adequate. They will be inquired into only upon a petition to amend the issues which indicates a serious deficiency.

party will not be able to carry out its proposals to a significant degree, the proposals themselves will be considered deficient.[11]

4. *Past broadcast record.* This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance upon the terms set forth below.

A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership per se, and will not give a preference because one applicant has owned stations in the past and another has not.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission (the fact that such representations have been carried out, however, does not lead to an affirmative preference for the applicant, since it is expected, as a matter of course, that a licensee will carry out representations made to the Commission).

If a past record warrants consideration, the particular reasons, if any, which may have accounted for that record will be examined to determine whether they will be present

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[11] It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect to their proposals for participation in station operation, i.e., to test the validity of integration proposals.

in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.

5. *Efficient use of frequency.*[12] In comparative cases where one of two or more competing applicants proposes an operation which, for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. The nature of an efficient operation may depend upon the nature of the facilities applied for, i.e., whether they are in the television or FM bands where geographical allocations have been made, or in the standard broadcast (AM) band where there are no such fixed allocations. In addition, the possible variations of situations in comparative hearings are numerous. Therefore, it is not feasible here to delineate the outlines of this element, and we merely take this occasion to point out that the element will be considered where the facts warrant.

6. *Character.* The Communications Act makes character a relevant consideration in the issuance of a license. See Section 308(b), 47 USC §308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situa-

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[12] This factor as discussed here is not to be confused with the determination to be made of which of two communities has the greater need for a new station. See Federal Communications Commission v. Allentown Broadcasting Corp., 349 US 358 [12 RR 2019].

tions where an applicant converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. *Other factors.* As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced.[13]

We pointed out at the outset that in the normal course there may be changes in the views of individual Commissioners as membership on the Commission changes or as Commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

Cases to be decided by either the Review Board or, where the Review Board has not been delegated that function, by the Commission itself, will be decided under the policies here set forth. So, too, future designations for hearing will be made in accordance with this statement. Where cases are now in hearing, the Hearing Examiner will be expected to follow this statement to the extent practicable. Issues

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[13] Where a narrow question is raised, for example on one aspect of financial qualification, a narrowly drawn issue will be appropriate. In other circumstances, a broader inquiry may be required. This is a matter for ad hoc determination.

already designated will not be changed, but evidence should be adduced only in accordance with this statement. Thus, evidence on issues which we have said will no longer be designated in the absence of a petition to add an issue, should not be accepted unless the party wishing to adduce the evidence makes an offer of proof to the Examiner which demonstrates that the evidence will be of substantial value under the criteria discussed herein. Since we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing. It is, of course, traditional judicial practice to decide cases in accordance with principles in effect at the time of decision. Administrative finality is also important. Therefore, cases which have already been decided, either by the Commission or, where appropriate, by the Review Board, will not be reconsidered. We believe that our purpose to improve the hearing and decisional process in the future does not require upsetting decisions already made, particularly in light of the basically clarifying nature of this document.

Dissenting Statement of Commissioner Hyde

I dissent to the adoption of the "Policy Statement on Comparative Broadcast Hearings" issued July 28, 1965.

One of the expressed objectives of the Policy Statement is the simplification and the expedition of the Commission's processes with respect to decisions in comparative cases. I agree with the majority that this is a most desirable objective; however, the Policy Statement as now framed will not achieve expedition. Moreover, to the extent that a degree of simplification of our decisional process may result from its adoption, this result, in my opinion, would be at a price which would be prohibitive and perhaps unlawful. It would press applicants into a mold in order to meet the Commission's preconceived standards, thus de-

terring perhaps better-qualified applicants from applying; it would preclude significant consideration of material differences among applicants and result in automatic preference of applicants slavishly conforming to the mold, and eventually force the Commission to decide cases on trivial differences among applicants since basically they would all have come out of the same press. I consider this much too high a price to pay to achieve the majority's objective.

I think the initiative in proposing how stations should be owned and operated should remain with the applicants, thus providing opportunities for diversified approaches. Moreover, in the interest of diversity, the initiative for the presentation of program plans should be left with applicants and without undue circumscription as to what should be included or excluded. Then, as a matter of elementary fairness, as well as due process, applicants should be entitled to examination and comparison on the merit of their respective proposals—not merely comparison with previously adopted positions. It may be that the check-off approach (as argued in the Policy Statement) will be helpful to Examiners and others in making decisions, but even this illusion of facility is certain to disappear as to cases involving competing new applicants who can plan to conform to prescribed formulas.

When competing applications for facilities are filed, the Commission must make an election which involves a comparison of characteristics. As was stated in Johnston Broadcasting Company v. FCC, USCA, DC, May 4, 1949:

> "The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases . . ."

In this situation, and in order to comply with the directive of the court, the Commission must consider among other things differences in makeup of applicants and differences in program proposals for the purpose of making the required comparison. But this requirement to consider differences in characteristics does not warrant the Commission to presume to establish—in the abstract—standardized preferences as to how applicants should be organized or as to how programs should be planned. I think that the effort to direct and standardize is incongruous with the basic policy of the Act.

I presume that one of the reasons for the adoption of the Policy Statement is to apprise potential applicants of the views of the Commission (and individual Commissioners) as to the manner in which differences among applicants will be treated. Decisions which have been made are available for this purpose. The views of the Commission and of individual Commissioners as to the effect of differences among applicants in comparative cases are set out in decisions which touch on such differences. Similarly, the specific views of dissenting or of separately-concurring Commissioners are available for analysis.

I know of no two cases where the underlying facts are identical. I know of no two cases where differences among the applicants are identical. Therefore, the significance to be given in each decision to each difference and to each criterion must of necessity vary, and must necessarily be considered in context with the other facts of the individual cases.

If the Commission has been remiss in the past in not spelling out the decisional process in each case as carefully as it should, the obvious remedy is improvement in the preparation of Decisions. Moreover, through more carefully written Decisions, both the Commission and the applicants can view the weight given to each difference and to each criterion in light of all of the facts in a given case.

To the extent the other relevant facts in the applicant's case require the same conclusion, an applicant can assume such conclusion will be reached by the Commission. To the extent the other relevant facts require or permit a different conclusion, the Commission will be free to so conclude. However, to attempt to cure what might be considered past omissions in not fully spelling out reasons for Decisions by prescribing an arbitrary order and weight to be given to each of such criteria seems to me to be idealizing form over substance, and avoiding statutory and legal requirements in doing so. This is especially true when no need exists for establishing this procedure since a simpler and more adequate solution is at hand.

The proposed fiat as to the weight which will be given to the various criteria—without sound predication of accepted data and when considered only in a vacuum and in the abtract—must necessarily result in a degree of unfairness to some applicants and in the fashioning of an unnecessary straightjacket for the Commission in its decisional process. How can we decide in advance and in a vacuum that a specific broadcaster with a satisfactory record in one community will be less likely to serve the broadcasting needs of a second community than a specific long-time resident of that second community who doesn't have broadcast experience? How can we make this decision without knowing more about each applicant? The majority now says that experience can always be acquired and, therefore, that it is less important than local residence. But the knowledge acquired from such local residence can by the same token be obtained just as easily—if not more easily—than broadcast experience. It seems clear to me that the importance to be given to the element of experience in one case or to the element of local residence in another case will necessarily vary in light of the additional factors involved in each case.

Moreover, the decision by an individual without broadcast experience (or perhaps even without business experi-

ence) to take full control of a complicated broadcast venture is held by this proposed Policy to be entitled to a significantly greater preference than a decision by a more prudent applicant who intends to secure competent, experienced and professional management to operate a station under his general direction until he acquires a reasonable degree of experience. It may be reasonable for the Commission to make such a conclusion in the light of all of the facts in a particular case, taking into consideration the specific attributes of the individual concerned, but it is obvious that the same conclusion need not be valid in a second case where the same attributes may not be present. The fact that it may be difficult to explain different decisions in the two cases is taken by the majority as sufficient reason to establish arbitrary preferences. This I cannot accept.

The evaluation of local needs and how best to provide for them is a highly subjective matter. Is the Commission competent—in advance of a review of all of the pertinent factors in a particular case—to decide that non-professional opinion as to the existence of needs or as to the manner in which the needs can best be fulfilled is automatically entitled to a greater weight than professional opinion based upon prior experience in substantially identical communities? I submit that it is not, and that although the decision might be difficult to make in any one case, and perhaps even more difficult to explain where the decisions differ on this factor in two cases, there can nevertheless be sound bases for different results in cases involving these elements. We should not be foreclosed from exploring them.

The language of the Policy Statement is quite broad in certain areas, while, at the same time, the statement tries to be precise and restrictive in its proposed results. For example, terms such as "unusually high percentage of time", "unusual attention to community matters", "minor differences in the proportion of time", "ordinary differences in judgment", etc., are used without definition as to the meaning of the terms. I presume that future decisions will spell

out at least some guidelines as to their meaning, but it is obvious that this will be achieved only at great cost to the applicants and after much litigation and then only in connection with the facts of a particular case. Since precise definitions are really not now feasible, why should these terms be employed? And since there appear to be no presently-existing guidelines which can be established in this document, then the ensuing wrangle in comparative cases as to what is ordinary, usual, unusual, high, etc., will take up at least the same time, if not more, than the mere introduction of proof of the basic facts.

I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. The document says that the policy is to apply to "new" applicants, and that it "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license". I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. The intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952. Since we must assume that the Commission will find it appropriate or necessary to make uniform application of its statement of preferences, it is essential to consider the consequences of such application. The filing of a new application—organized according to formula—to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. Is the Commission now ready to read out established broadcasters, not locally owned, but otherwise without blemish in favor of any locally-owned applicants? Is the Commission now ready to read out established broadcasters who are without blemish, except that they utilize competent personnel who do not have an ownership interest, in favor of applicants who

propose to operate the facilities personally? Is the Commission ready to accept a new applicant formed to meet this preconceived mold in preference to an existing broadcaster who does not fit into such mold regardless of other circumstances?

I must assume that in the above cases the Commission will not reach its judgments arbitrarily and without giving consideration to all of the significant elements. Upon this assumption, I can foresee the development of case after case where exceptions to the Policy will be found to be necessary in order to reach a decision which a majority will consider to be fair and in the public interest. I can foresee a decisional process which eventually will be substantially similar—if not virtually identical—to the one in existence. Under these circumstances, I cannot believe that the public interest will be served, or the processes of the Commission expedited, by the adoption of the proposed Policy Statement.

No useful purpose would appear to be served by further belaboring these points. While the motives of the majority may be excellent, I do not believe that its objectives can thus be achieved. Moreover, I fear that the degree of uniformity which is being sought will necessarily be detrimental to broadcasting in general and to the public interest.

An overall objection which I think I should state is that the Commission is, in effect, placing legislative-like restrictions upon performance under the responsibility Congress intended it to implement with broad discretion. It would appear that we do not trust Commissioners to exercise judgment with as much discretion as Congress intended to repose in the Agency. This restrictive approach not only limits the Agency, but, as has been indicated, threatens to inhibit the development of services which do not conform to preconceived molds.

I think that the Commission should consider—instead of the adoption of this proposed "Policy Statement"—the in-

troduction of such modern and accepted procedural methods as "discovery"—requiring its staff to make a more careful examination of each competing applicant prior to the issuance of hearing orders so as to specify issues which will encompass all material differences among the applicants rather than ordering hearings on generalized, boilerplate issues and preconceived conclusions; and writing its decisions with such care as to eliminate frivolous and inconsequential matter and in such a manner that applicants would be readily apprised of areas which the Commission considers to be vitally important. I believe that discovery procedure alone will do more to bring light—and to minimize heat—in comparative cases than a general adjuration of trivia. If the parties and, in fact, the Commission can secure factual information about each of the applicants before the hearing, and if, thereafter, the Commission will exercise care and discretion in the framing of the issues, more will have been achieved to shorten our hearing procedures than can reasonably be expected from the adoption of this Policy Statement.

Dissenting Statement of Commissioner Robert T. Bartley

I believe that our comparative hearings should be expedited by eliminating what has amounted to extensive bickering in the record over minutiae.

As I see it, however, the Commission majority is attempting the impossible here when it prejudges the decisional factors in future cases. My observation is that there are no two cases exactly alike. There are so many varying circumstances in each case that a factor in one may be more important than the same factor in another. Broadcasting —a dynamic force in our society—experiences constant change. I have expressed it differently on occasions by saying, "There's nothing static in radio but the noise." If we are to encourage the larger and more effective use of radio in the public interest, we must avoid becoming static ourselves.

Concurring Statement of Commissioner Robert E. Lee

Even though I recognize the Policy Statement adopted by the Commission to be the result of a sincere effort to clarify the historical process of selecting a winner in comparative broadcast hearings, I am concurring with considerable reluctance. I am disappointed that the Commission did not examine alternative methods of "picking a winner" from a group of competing applicants, each of which may be fully qualified but only one of which may be granted. For example, in a recent case involving nine applications where I unqualifiedly concurred with the result arrived at by the majority, I said:

> "However, I would much prefer such appropriate changes in the Communications Act and in the Commission's practices and policies as would have permitted, in a case such as this, adoption of a procedure which would, on a comparative basis, eliminate from further consideration several of the applications, and which would have permitted us to direct the remaining applicants to endeavor to work out a satisfactory merger arrangement within a stated reasonable period. In the event that such a merger were thereafter presented to the Commission, an award could have been given to the merged entity. Failing such a merger, the Commission would thereupon proceed to select a winner from among the limited eligibles." Veterans Broadcasting Company, Inc., et al, decided January 19, 1965 [4 RR 2d 375].

Over the years I have participated in Decisions in hundreds of "comparative proceedings" and candor compels me to say that our method of selection of the winning applicant has given me grave concern. I realize, of course, that where we have a number of qualified applicants in a consolidated proceeding for a single facility in a given community, it is necessary that we grant one and deny the others. The ultimate choice of the winner generally sus-

tains the Commission's choice despite the recent rash of remands from the court. Thus, it would appear that we generally grant the "right" application. However, I am not so naive as to believe that granting the "right application" could not, in some cases, be one of several applications.

The criteria that the Commission now says will be decisive—assuming all other things are substantially equal—in choosing among qualified applicants for new broadcast facilities in comparative hearings, are not new. However, the Policy Statement does tend to restrict the scope somewhat of existing factors and if undue delay in the disposition of comparative broadcast hearings is thus prevented, some good will have been accomplished.

I wish to make clear that my concurrence here does not bind me with respect to the weight I might see fit to put upon the various criteria in a given case. For example, while I recognize the problem of diversification of the mass media, I also recognize some counterbalancing in the advantages of common ownership of a radio station and a newspaper. I am also persuaded that the public interest may be served by the common ownership of a radio station and a CATV system in the same market. In other words, if it should appear to me in a given proceeding that the owner of a newspaper or of a CATV system would do the better job of serving a particular community, I would not be so concerned with the composition of such an applicant that I would select another that was not "tainted" with the media of mass communication.

Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission Decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a torturous and expensive hearing wherein each applicant attempts to tear down his adversaries on every

conceivable front, while individually presenting that which he thinks the Commission would like to hear. The Examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense—but comes the Oral Argument and all of the losers concentrate their fire on the "potential" winner and the Commission must thereupon examine the claims and counterclaims, "weigh" the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 per cent of the cases.

The real blow, however, comes later when the applicant that emerged as the winner on the basis of our "decisive" criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a "helleva way to run a railroad", and I hope these few comments may inspire the Commission to find that better system even if it requires changes in the Communications Act.

APPENDIX F

FCC Policy Statement on Comparative Hearings

F.C.C. 70-62

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
POLICY STATEMENT CONCERNING COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS

JANUARY 15, 1970.

THE COMMISSION, BY COMMISSIONERS BURCH (CHAIRMAN), BARTLEY, ROBERT E. LEE, COX, H. REX LEE, AND WELLS, WITH COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT, ISSUED THE FOLLOWING PUBLIC NOTICE:

In 1965 the Commission issued a policy statement on comparative broadcast hearings which is applicable to hearings to choose among qualified new applicants for the same broadcast facilities. See "Policy Statement on Comparative Broadcast Hearings," 1 F.C.C. 2d 393. We believe that we should now issue a similar statement as to the comparative hearing where a new applicant is contesting with a licensee seeking renewal of license. We have, of course, set forth our policies in this respect in several cases, and indeed, have done so in designating issues in some very recent cases. For example, *In re Application of RKO General, Inc.*, F.C.C. 69-1335, paragraph 8; *In re Application of Lamar Life Broadcasting Co.*, F.C.C. 69-1336, paragraph 2. There has, however, been considerable controversy on this issue, as shown by the hearings on S. 2004 now going forward before the Senate Subcommittee on Communications. Issuance of this statement will therefore contribute to clarity of our policies in this important area. This will be of assistance to the examiners who initially decide the cases. It will expedite the hearing process and promote consistency of decision. Above all, by informing the broadcast industry and the public of the applicable standards, the public interest "in the larger and more effective use of radio" (sec. 303(g) of the Communications Act) will be served.

The statutory scheme calls for a limited license term. This permits Commission review of the broadcaster's stewardship at regular intervals to determine whether the public interest is being served; it also provides an opportunity for new parties to demonstrate in public hearings that they will better serve the public interest. It is this latter aspect of the statutory scheme with which we deal here. See sections 307, 308, 309.

The public interest standard is served, we believe, by policies which insure that the needs and interests of the listening and viewing public will be amply served by the community's local broadcast outlets. Promotion of this goal, with respect to competing challenges to renewal applicants, calls for the balancing of two obvious considerations. The first is that the public receive the benefits of the statutory spur inherent

in the fact that there can be a challenge, and indeed, where the public interest so requires, that the new applicant be preferred. The second is that the comparative hearing policy in this area must not undermine predictability and stability of broadcast operation.

The institution of a broadcast service requires a substantial investment, particularly in television, and even where the investment is small it is likely to be relatively large to the person making it. It would disserve the public interest to reward good public service by a broadcaster by terminating the authority to continue that service. If the license is given subject to withdrawal despite a record of such good service, it will simply not be possible to induce people to enter the field and render what has become a vital public service. Indeed, rather than an incentive to qualified broadcasters to provide good service, it would be an inducement to the opportunist who might seek a license and then provide the barest minimum of service which would permit short run maximization of profit, on the theory that the license might be terminated whether he rendered a good service or not. The broadcast field thus must have stability, not only for those who engage in it but, even more important, from the standpoint of service to the public.

We believe that these two considerations call for the following policy—namely, that if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area,[1] and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer and his application for renewal will be granted. His operation is not based merely upon promises to serve solidly the public interest. He has done so. Since the basic purpose of the act—substantial service to the public—is being met, it follows that the considerations of predictability and stability, which also contribute vitally to that basic purpose, call for renewal.

This is not new policy. It was largely formulated in the leading decision in this field, *Hearst Radio, Inc.* (*WBAL*), 15 F.C.C. 1149 (1951), where the Commission, in favoring the existing licensee, stated that where a choice must be made between an existing licensee and a newcomer, a grant will normally be made to the existing station if its operation has been meritorious, and that a good record may outweigh preferences to a newcomer on such factors as local residence and integration of ownership and management. The *WBAL* policy was followed in *In re Wabash Valley Broadcasting Corp.*, 35 F.C.C. 677 (1963), and cited with approval in recent actions (see, e.g., *In re Application of RKO General, Inc.*, F.C.C. 69–1335, par. 8).

If on the other hand the hearing record shows that the renewal applicant has not substantially met or served the needs and interests of his area, he would obtain no controlling preference. On the con-

[1] We wish to stress that we are not using the term "substantially" in any sense of partial performance in the public interest. On the contrary, as the discussion within makes clear, it is used in the sense of "solid", "strong", etc. (see p. 3, supra) performance as contrasted with a service only minimally meeting the needs and interests of the area. In short, we would distinguish between two types of situations—one where the licensee has served the public interest but in the least permissible fashion still sufficient to get a renewal in the absence of competing applications (defined herein as minimal service) and the other where he has done so in an ample, solid fashion (defined herein as substantial service).

trary, if the competing new applicant establishes that he would substantially serve the public interest,[2] he should clearly be preferred over one who was given the opportunity to do so but chose instead to deliver less than substantial service to the public. In short, the past record of the renewal applicant is still the critical factor, but here it militates against renewal and in favor of the new applicant, provided that the latter establishes that he would solidly serve the public interest.

We recognize that the foregoing policy does not work with mathematical precision, and that particular factual circumstances will have to be explored in the hearing process. For example, if there are substantial questions as to whether the renewal applicant's operation has been characterized by serious deficiencies—such as rigged quizzes, violations of the Fairness Doctrine, overcommercialization, broadcast of lotteries, violation of racial discrimination rules, or fraudulent practices as to advertisers—the facts as to these matters would have to be established, and any demerits resulting therefrom weighed against the renewal applicant in the public interest judgment which must be made. It is not possible to lay down any more precise standards here, since so much will depend on the particular facts.

Further, we recognize that the terms "substantially" and "minimally" also lack mathematical precision. However, the terms constitute perfectly appropriate standards. Thus, the word "substantially" is defined as "strong: solid; firm: much: considerable; ample; large: of considerable worth or value: important" (Webster's New World Dictionary College Edition, p. 1454): [3] the word "minimal" carries the pertinent definition, "smallest permissible" (Id. at p. 937). However, application and evolution of the standards would again be left to the hearing process. The renewal applicant would have a full opportunity to establish that his operation was a "substantial" one, solidly meeting the needs and interests of his area, and not otherwise characterized by serious deficiencies. He could, of course, call upon community leaders to corroborate his position. On the other hand, the competing party would have the same opportunity in the hearing process to demonstrate his allegation that the existing licensee's operation has been a minimal one. And he, too, can call upon community leaders to testify to this effect if that is, indeed, the case. The programing performance of the licensee in all programing categories (including the licensee's response to his ascertainments of community needs and problems) is thus vital to the judgment to be made. Further, although the matter is not a comparative one but rather whether substantial service has been rendered, the efforts of like stations in the community or elsewhere to supply substantial service are also relevant in this critical judgment area. There would, of course, be the necessity of taking into account pertinent standards which are evolved by the Commission in this field.

Two other points deserve stress in this respect. First, unlike the case involving new applicants (see 1 F.C.C. 2d at pp. 397–98), a

[2] With several such new applicants, the "Policy Statement on Comparative Broadcast Hearings," 1 F.C.C. 2d 393, would be the basis for decision as among them.

[3] We also note that the term is frequently employed in statutes, e.g., 15 U.S.C. 13 (the Clayton Act); 42 U.S.C. 403(f)(4)(A) (Social Security Act); 26 U.S.C. 382(a)(1)(C) (Internal Revenue Act); indeed, it is used in the Communications Act, 47 U.S.C. 503(b)(1)(A).

programing record will be considered even though it is not alleged to be either unusually good or bad. Thus, the renewal applicant will not have to demonstrate that his past service has been "exceptionally" or "unusually" worthy. Were that the criterion, only the exceptional or unusual renewal applicant would win a grant of continued authority to operate, and the great majority of the industry would be told that even though they provide strong, solid service of significant value to their communities, their licenses will be subject to termination. As stated at the outset, such a policy would disserve the public interest. And conversely, a new applicant would not have to allege that the existing licensee's operation had been unusually bad.

Second, the renewal applicant must run upon his past record in the last license term. If, after the competing application is filed, he upgrades his operation, no evidence of such upgrading will be accepted or may be relied upon. To give weight to such belated efforts to meet his obligation to provide substantial service would undermine the policy of the competitive spur which Congress wisely included in the Communications Act. A renewal applicant could simply supply minimal service from year to year, secure in the knowledge that even if a competing application were filed at the time of renewal, he could then upgrade to show substantial service. Therefore, no evidence as to improved service after the filing of the competing application (or a petition to deny directed to programing service) will be deemed admissible in the hearing. This is, of course, a departure from the procedure permitted in the *WBAL* case.

Further, the renewal applicant, seeking to obtain the benefits of this policy, cannot properly supply minimal service during the first 2 years of his license term and then upgrade during the third year because of the imminence of possible challenge. The act seeks to promote conscientious and good faith substantial service to the public—not a triennial flirtation with such service. Therefore, while we recognize that the licensee's programing efforts do and must vary over a license period and hopefully are continually being improved, we could not weigh as controlling or determinative a pattern of operation which showed substantial service only in the last year of the license term.

We note also the question of the applicability here of our policy of diversification of the media of mass communications. We do not denigrate in any way the importance of that policy or the logic of its applicability in a comparative hearing involving new applicants. See 1 F.C.C. 2d at pp. 394–95. We have stated, however, that as a general matter, the renewal process is not an appropriate way to restructure the broadcast industry. For example, *In re Application for Renewal of WTOP–TV*, F.C.C. 69–1312. Where a renewal applicant with other media interests has in the past been awarded a grant as consistent with the Commission's multiple ownership rules and policies, and thereafter proceeded to render good service to his area, it would appear unfair and unsound to follow policies whereby he could be ousted on the basis of a comparative demerit because of his media

holdings.[4] Here again, the stability of a large percentage of the broadcast industry, particularly in television, would be undermined by such a policy. Our rules and policies permit multiple ownership, and the industry has made substantial commitments based on those rules and policies. These rules are not sacrosanct, and indeed should and must be subject to periodic review. We are now engaged in such review in a number of overall rulemaking proceedings. For example, FCC dockets Nos. 18110 and 18397. If any rulemaking proceeding, now pending or initiated in the future, results in a restructuring of the industry, it will do so with proper safeguards, including most importantly an appropriate period for divestment. Such a way of proceeding is, we believe, sound and "best conduces to the proper dispatch of business and the ends of justice;" section 4(j) of the Communications Act; *WJR* v. *F.C.C.*, 337 U.S. 265, 282 (1948). In short, whatever action may be called for in special hearings where particular facts concerning undue concentration or abusive conduct in this respect are alleged,[5] the overall structure of the industry, so far as multiple ownership and diversification are concerned, should be the subject of general rulemaking proceedings rather than ad hoc decisions in renewal hearings.

We believe the issuance of this policy statement will expedite the hearing process in this area. Examiners will be clear as to our general policy. Indeed, it may significantly shorten hearings. If the examiner, at the conclusion of the initial phase of a hearing dealing with a renewal applicant's past record, has no doubt that the existing licensee's record of service to the public is a substantial one, without serious deficiencies, he should, either on his own motion or that of the renewal applicant, halt the proceeding at this point and issue an initial decision based upon that determination. However, where the matter is in any way close or in doubt, it would be more appropriate to proceed with the hearing, and thus insure that the record is complete when the matter comes before the Commission.

Most important, as stated above, the policy will markedly serve the public interest by informing the broadcast industry and the public of their responsibilities and rights. And, in doing so, it retains the competitive spur provided in the Communications Act and yet insures predictability and stability of broadcast operations. For the policy says to the broadcaster, "if you do a solid job as a public trustee of this frequency, you will be renewed; your future is thus really in your hands." The policy says to all interested persons, "The act seeks to promote not just minimal service but solid, substantial service; if at renewal time, a group of you believe that an applicant has not rendered such service, you may file a competing application and will be afforded the opportunity, in a hearing to establish your case. If you do so, you will be granted authority to operate on the frequency

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[4] Of course, if such a renewal applicant has not rendered substantial service, he might also face a demerit on the diversification ground. Such an additional demerit might well be academic, since, barring the case where his competitor is also deficient in some important respect, a past record of minimal service to the public is likely to be determinative, in and of itself, against the renewal applicant.

[5] *In re Applications of Midwest Television, Inc.*, F.C.C. 69-261; *In re Applications of Chronicle Broadcasting Company*, F.C.C. 69-262.

in place of the renewal applicant who has failed to provide substantial service." [6]

The policy is thus fair to the broadcaster and to the new contestant, and above all it serves the listening and viewing public. To the argument that the hearing process itself is an unfair burden, the short answer is that such hearings stem directly from the statutory scheme, and particularly from the notion that the broadcaster is a public trustee who can acquire no permanent ownership of the frequency on which he operates. With even-handed administration of the policy, there is unlikely to be any plethora of frivolous challengers, in view of the significant costs involved.[7] And in any event, where frivolous challenges are made, the examiner may in his discretion, and should, take action to avoid a long drawn out hearing. In the final analysis, the broadcaster has, we believe, the answer within his hands—if he really knows and cares about his area and does a good substantial job of serving it, he will discourage challenges to his renewal applications.

We recognized that there can be concern whether this policy will prevent a new applicant willing to provide a superior service from supplanting an existing licensee who has broadcast a substantial, but less impressive, service. But, as stated, there are obvious risks in accepting promises over proven performance at a substantial level, and we see no way, other than the one we have taken, adequately to preserve the stability and predictability which are important aspects of the overall public interest. We believe that there will still be real incentives for those existing broadcasters willing to provide superior service to do so, since the higher the level of their operations, the less likely that new applicants will file against them at renewal time. And as the Commission spells out, in decided cases, the elements which constitute substantial service, it will serve the private interests of broadcasters to make certain that their operations fall clearly into that class of service. Thus the public interest will be served by the continuing efforts of broadcasters to minimize the chances of the filing of competing applications.

The foregoing policy is limited to comparative hearings between renewal applicants and new applicants for the same facilities in the same community. The restriction to the same community is necessary to exclude from this policy contests between applicants for different communities which are governed by the provisions of section 307(b) of the act, since this section requires that the grant go to the community most in need of the station, without regard to the comparative qualities of the applicants. In practical effect, this section applies solely to standard broadcasting.[8] Such AM cases involve considerations quite different from those with which the Commission is concerned here, and are thus not dealt with in this statement.

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[6] It would be expected that appropriate arrangements could and would be made to purchase facilities owned by the existing station. See, e.g., *In re Application of Biscayne Television Corp.*, 33 F.C.C. 851 (1962).

[7] We wish to stress, with the issuance of this statement, that barring extraordinary circumstances, the challenger to a renewal cannot be reimbursed in any amount for his expenditures in preparing and prosecuting his application, nor will merger agreements be countenanced.

[8] The policy set forth herein will apply where a new applicant files against a renewal applicant, seeking to use the contested FM or TV channel in a different community under the provisions of secs. 73.203(b) or 73.607(b) of our rules.

As shown by our recent actions (see p. 1, supra), this policy is of course applicable to pending proceedings, and indeed, we stress again that its essential holding reflects long established precedent. The policy statement is inapplicable, however, to those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant. In such cases, while the past record, favorable or unfavorable, is of course pertinent and should be examined, the *WBAL* policy, as here amplified, is inapplicable; a good record without serious deficiencies will not be controlling in such cases so as to obviate the comparative analysis called for in the "Policy Statement on Comparative Broadcast Hearings," 1 F.C.C. 2d 393 (1965).

In sum, we believe that this is the best possible balancing of the competing aspects of the public interest which are to be served in this area. However, the promise of this policy for truly substantial service to the public will depend on the consistency and determination with which the Commission carries out this policy in the actual cases which come before it. Only if we truly develop and hold to a solid concept of substantial service, will the public derive the benefits this policy is designed to bring them. We pledge that we will do so, and in turn call upon the industry and interested public to play their vital roles in the implementation of this policy.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

The issues surrounding citizen participation in the license renewal process are among the most complex and significant before the FCC.

The nature of the American political process is such that any efforts to regulate broadcasting by either Congress or this Commission must constitute a negotiated compromise of sorts. That the broadcasting industry today is perhaps the most powerful Washington lobby in our Nation's history is generally acknowledged. Popular reform movements always start with a substantial disadvantage. For none is that more true than for those groups trying to improve the contribution of television to the quality of American life. But, then, the stakes are higher.

There is no question but that the American people have been deprived of substantial rights by our action today. There is also no question that the results could be much worse—given the commitment of the broadcasting industry on this issue, and the introduction of legislation (such as S. 2004) by 22 Senators and 118 Representatives.

The policy statement has been discussed by us calmly and at length. Each Commissioner has endeavored to balance the conflicting interests of broadcasters and public. The language has been revised in a spirit of accommodation: the public interest is better served as a result. Because of my participation in these drafting efforts I feel considerable inclination to concur. On agonizing balance, however, I find I cannot.

There is a germ of legitimate concern in the broadcasters' position. (1) It is inequitable that a broadcaster who has made an exceptional effort to serve the needs of his community, and whose programing is outstanding by any measure, should be subjected to the expense

and burden of lengthy hearings merely because some fly-by-night chooses to take a crack at his license. (2) When evaluating a competing application in a renewal case, a record of outstanding performance by the licensee obviously should be given considerable weight. (3) It is far better to provide consistent national standards for station ownership by general rulemaking (with divestiture if necessary) than to involve them on the case-by-case happenstance of which stations' licenses happen to be challenged. (4) There are some public benefits from stability for those broadcasters who take their responsibilities seriously.

What the public loses by this statement can be summarized in the word "competition." The theory of the 1934 Communications Act was that the public would be served by the best licensees available. No licensee would have a right to have his license renewed. Each would be open to the risk that a competing applicant would offer a service preferable in some way, and thereby win the license away. The FCC was to choose the best from among the applications before it, whether the incumbent's record was mediocre or excellent. This is the principle of the marketplace: the public is assured the best products by opening the market to all sellers, comparing their products, and rewarding the best with the greater sales. The analogy in broadcasting is the competing application. The FCC is the public's proxy. It is we who must make the choice among competitors: it is the public that receives the benefits (or burdens) of our choice.

What we have done in this policy statement is comparable to providing that there could be no new, competing magazines, automobiles or breakfast cereals unless a new entrant could demonstrate that the presently available products are not substantially serving the public interest. The affected industry's arguments on behalf of such a policy would be quite similar to those presented by the broadcasters in this instance. But this country has long believed that the public will be better served over the long run by free and open competition. And after lengthy consideration it is still my belief that, on balance, the principle is equally valid in the broadcasting industry.

Given the harsh political reality that the broadcasters have the power to obtain some measure of protection against competing applications, there are at least some possible public benefits from the policy statement we have drafted.

It is impossible, or at least unlikely, that there would ever be a sufficient number of public organizations to contest each of the 7,500 radio and television station licenses in this country. Any truly effective efforts at reform will have to apply to all stations equally. This FCC policy statement may have some salutary impact industrywide.

What we have created, in effect, are four levels of performance: (1) Not minimally acceptable. A licensee in this category will not have his license renewed, whether or not it is contested. (2) Minimally acceptable. If it meets this standard, a licensee without a competing application will be renewed by the Commission. If it is challenged, however, it will be set for hearing. (3) Substantial service. If a licensee is challenged at renewal by a competing applicant, the hearing will be terminated if the examiner finds, after initial evaluation, that the

licensee has been "substantially attuned to meeting the needs and interests of its area." This amounts to a form of summary judgment, saving both broadcaster and challenger the burden of a lengthy hearing likely to be futile. (4) Comparative public interest. If a licensee under challenge by a competing applicant cannot meet the substantial service standard, a full evidentiary hearing will be held. The licensee must then demonstrate that its renewal will serve the public interest, and would be comparatively preferable to awarding the license to the challenger.

The upshot may very well be an improvement in radio and television programing performance by all licensees.

At the present time many broadcasters know that a minimal performance is all that's required for license renewal. This belief is exascerbated by an FCC majority's willingness to find that no news and public affairs adequately serves the public interest, Herman C. Hall, 11 F.C.C. 2d 344 (1968), and that a licensee on probation who has bilked advertisers of $6,000 through fraud is entitled to another probationary term, Star Stations of Indiana, Inc., 19 F.C.C. 2d 991, 996 (1969). Commissioner Cox and I have tried, so far without success, to urge the application of some standards, however minimal, to the Commission's license renewal process. Renewal of Standard Broadcast and Television Licenses [Oklahoma], 14 F.C.C. 1 (1968); Renewal of Standard Broadcast and Television Licenses [New York-New Jersey], 18 F.C.C. 2d 268, 269, 322 (1969); District of Columbia, Maryland, Virginia, West Virginia Broadcast License Renewals, —— F.C.C. 2d —— (1969).

The industry's response to the initial WHDH decision, WHDH, Inc., 16 F.C.C. 2d (1969), and the increased effectiveness of public groups devoted to improving broadcasting has been confused and irrational, and of mixed impact on programing. The policy statement will remove much of this confusion.

The Commission has made it clear that it will not permit chaos to reign, that the better broadcasters have nothing to fear, and that all can get back to the task of programing their stations in ways that serve the awesome needs of the American people for quality entertainment, cultural enrichment, continuing education, and information and analysis about life in the communities and world in which they live. The more responsible broadcasters now know they will be protected from harassment from audience on FCC.

On the other hand, the public now clearly understands that a new day has dawned: licenses will not be automatically renewed; those licensees not offering substantial service are open to challenge.

The below-average broadcasters should respond to this new state of affairs by upgrading their programing from a minimal to a substantial performance. They now have a very real incentive to purchase this renewal insurance against the possibility of a challenge.

Moreover, the statement only relates to competing license challenges, not petitions to deny license renewals. Such petitions may still be filed and considered against any licensee. Their consideration in the future may very well be more rigorous than at present. No smart licensee will lightly risk walking too close to the cliff of minimal performance.

And, of course, a competing license challenge may also be filed against any licensee in good faith, even though it utimately may be rejected by an examiner. Only the broadcaster who is confident his performance is well above average can be assured of the outcome.

And, in the last analysis, as the statement concedes, its ultimate impact will only be known after the examiners, FCC and courts have processed some cases. No statements of policy can affect the FCC's will to act (or lack thereof) in deciding whether to deny license renewal in one-hundredth of 1 percent, one-tenth of 1 percent, 1 percent or 10 percent of the renewal cases coming before it. (With roughly 2,500 license renewals a year, these percentages are equivalent to one denial every 4 years, two or three a year, 25 a year and 250 a year, respectively.) No statement of policy can be the basis for predicting such percentages with any greater precision until the results are in.

There are legal and public relations considerations involved in issuing this statement as fait accompli rather than as proposed rulemaking for public comment. I will not review the issues here, except to say that I think it would have been wiser, on such a controversial matter, to use the rulemaking procedure.

I cannot avoid reference, in passing, to the significance of this particular kind of necessary compromise with broadcasting's power. The record of Congress and the Commission over the years shows their relative powerlessness to do anything more than spar with America's "other government," represented by the mass media. Effective reform, more and more, rests with self-help measures taken by the public. Recognizing this, the broadcasters now seek to curtail the procedural remedies of the people themselves. The industry's power is such that it will succeed, one way or another. This is sad, because—unlike the substantive concessions it has obtained from Government from time to time—there is no turning back a procedural concession of this kind once granted. Not only can the industry win every ball game, it is now in a position to change the rules.

I have considerable sympathy and respect for my colleagues' commendable and good faith effort to resolve this conflict between formidable political power and virtually unrepresented public interest. They have tried. They really have. And it is not at all clear to me that more than they have done would have been politically possible, or could have withstood political appeal. It is not even clear that today's effort is secure.

Thus it is, with no feelings save understanding, frustration and sorrow, that I dissent.

APPENDIX G

A. Statutes:

Communications Act of 1934, as Amended, 48 Stat. 1064; 47 U.S.C. 151-609:

1. SECTION 307(d); 47 U.S.C. 307(d), provides as follows:

> No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a sta-

tion of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

2. SECTION 309(b)(1); 47 U.S.C. 309(b)(1), provides as follows:

> Except as provided in subsection (c) of this section, no such application—
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> (1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services,
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> • • • •
>
> shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

3. SECTION 310(b); 47 U.S.C. 310(b), provides as follows:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

B. Rules and Regulations of the Federal Communications Commission, 47 CFR:

1. SECTION 1.533(a)(1); 47 CFR 1.533(a)(1), provides as follows:

> Applications for new facilities or modification of existing facilities shall be made on the following forms:
>
> (1) FCC Form 301 "Application for Authority to Construct a New Broadcast Station or Make Changes in an Existing Broadcast Station."

2. SECTION 1.539(a); 47 CFR 1.539(a), provides as follows:

> Unless otherwise directed by the Commission, an application for renewal of license shall be filed at least 90 days prior to the expiration date of the license sought to be renewed, except that applications for renewal of license of an experimental or developmental broadcast station shall be filed at least 60 days prior to the expiration date of the license sought to be renewed.

3. SECTION 1.539(d)(1); 47 CFR 1.539(d)(1), provides as follows:

> The following application forms shall be used:
>
> (1) FCC Form 303 "Application for Renewal of Broadcast Station License."

4. SECTION 73.34(a)(8); 47 CFR 73.34(a)(8), as it stood in 1962, provides as follows:

> Initial licenses for standard broadcast stations will ordinarily be issued for a period running until the date specified in this section for the State or territory in which the station is located or, if issued after such

date, to the next triennial renewal date determined in accordance with this section; and, when renewed, will normally be renewed for 3 years: *Provided, however,* That, if the Commission finds that the public interest, convenience or necessity will be served thereby, it may issue either an initial license or a renewal thereof for a lesser term. The time of expiration of normally issued initial and renewed licenses will be 3 a.m., local time, on the following dates, and at 3-year intervals thereafter:

* * * *

(8) For stations located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, April 1, 1963.

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FILED
APR 23 1971
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,
GREATER BOSTON TELEVISION CORPORATION,
GREATER BOSTON TV CO., INC.,
CHARLES RIVER CIVIC TELEVISION, INC., and
BOSTON BROADCASTERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	4
Statutes and FCC Rules Involved	4
Statement	4
A. The Earlier Proceedings	4
B. The Current Comparative Proceeding Before the Commission	8
1. The Hearing Examiner's Initial Decision	8
2. The Commission's Decision	10
C. The Ruling of the Court Below	12
Reasons for Granting the Writ	16
Conclusion	28

APPENDICES SEPARATELY BOUND

Appendix A—Opinion Below	1a
Appendix B—Judgments Below	44a
1. Judgment of Affirmance	44a
2. Order Denying Rehearing	44a
Appendix C—Opinion of April 16, 1964	47a
Appendix D—Pertinent FCC Decisions	52a
1. FCC Decision adopted January 22, 1969, released January 23, 1969 (16 FCC 2d 1)	52a
2. Initial Decision of Hearing Examiner, adopted August 10, 1966, released August 15, 1966 (16 FCC 2d 29)	80a

Page

3. FCC Memorandum Opinion and Order adopted May 19, 1969, released May 20, 1969 (17 FCC 2d 856) 306a

4. FCC Decision adopted September 25, 1962, released September 26, 1962 (33 FCC 449) 326a

5. FCC Decision adopted March 13, 1963, released March 15, 1963 (34 FCC 537) 345a

Appendix E—FCC Policy Statement on Comparative Broadcast Hearings, July 28, 1965 (1 FCC 2d 393) 350a

Appendix F—FCC Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, January 14, 1970 (22 FCC 2d 424) 373a

Appendix G—Statutes Involved 383a

APPENDIX BOUND HEREIN

Appendix H—Opinion and Order Denying WHDH's Motion To Remand H1

AUTHORITIES CITED

CASES:

Brooks v. *Florida*, 389 U.S. 413 27
Burlington Truck Lines v. *United States*, 371 U.S. 156 ..... 21, 22, 23
Chicago Fed. of Labor v. *FRC*, 41 F.2d 422 9
Community Broadcasting Corporation v. *FCC*, 363 F.2d 717 15
Community First Corp. v. *FCC*, 403 F.2d 578 14
Consolidated Nine, Inc. v. *FCC*, 403 F.2d 585 14
Durham v. *United States*, #5298, this Term 22
Greater Boston Television Corp. v. *FCC*, 334 F.2d 552 ..... 2, 3, 7, 25
Greene v. *United States*, 376 U.S. 149 27
Massachusetts Bay Telecasters, Inc. v. *FCC*, 261 F.2d 55 ..... 2, 3, 5, 9

Page

Massachusetts Bay Telecasters, Inc. v. *FCC*, 295 F.2d 131, cert. denied 366 U.S. 918 ..... 2, 6, 24
Office of Communication of United Church of Christ v. *FCC*, 425 F.2d 543 14
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 21
Securities & Exchange Commission v. *Chenery Corp.*, 318 U.S. 80 ..... 20, 22, 23
Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194 ..... 20, 21, 22, 23
Thompson v. *Louisville*, 362 U.S. 199 27
United States v. *Morgan*, 313 U.S. 409 26
United States v. *Wunderlich*, 342 U.S. 98 19
Vitarelli v. *Seaton*, 359 U.S. 535 27
White v. *Texas*, 310 U.S. 530 27
Ziang Sung Wan v. *United States*, 266 U.S. 1 27

Judiciary and Judicial Procedure:

28 U.S.C. 1254(1) 3

Supreme Court Rules:

19(1)(b), 398 U.S. at 1030 27
35(5)(b) of 1925, 266 U.S. at 681 27

MISCELLANEOUS:

Policies of the Federal Communications Commission:

Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 ..... 3, 9, 19

Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 FCC 2d 424 ..... 3, 13, 17, 19, 23, 26

Jaffe, L.L.: "We Need the Pastore Bill", *The New Republic*, December 6, 1969 17

Jaffe, L.L.: WHDH: The FCC and Broadcast License Renewals, 82 Harv. L. Rev. 1693 17

Page

COMMISSION DECISIONS:

Community First Corp., 17 FCC 2d 479 14
Consolidated Nine, Inc., 17 FCC 2d 482 14
Hearst Radio, Inc. (WBAL), 16 FCC 141 .....9, 10, 13, 14, 17, 19
Lamar Life Broadcasting Co., 26 FCC 2d 100 14
RKO General, Inc. (KHJ-TV), 31 Fed. Reg. 8253 10
RKO General, Inc., FCC 69-1335 (34 Fed. Reg. 19852) 13
Wabash Valley Broadcasting Corp. (WTHI-TV), 35 FCC 677 .....9, 10, 13, 17, 19
WHDH, Inc., 18 RR 1101 ..... 2, 5
25 RR 80 7
22 FCC 767 ..... 2, 4
29 FCC 204 .....2, 5, 6, 24
29 FCC 986 2
33 FCC 449 .....3, 6, 7
34 FCC 537 3
16 FCC 2d 1 .....2, 19
16 FCC 2d 29 ..... 2, 8
17 FCC 2d 856 2

STATUTES AND RULES:

Communications Act of 1934, as amended:
47 U.S.C. 151 4
47 U.S.C. 307(d) 14
47 U.S.C. 307(e) 6
47 U.S.C. 310(b) 11
47 U.S.C. 402(j) 3

Rules of the Federal Communications Commission:
47 C.F.R. 1.539(a)(i) 6
47 C.F.R. 73.34(a)(8) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

WHDH, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION,
GREATER BOSTON TELEVISION CORPORATION,
GREATER BOSTON TV CO., INC.,
CHARLES RIVER CIVIC TELEVISION, INC., and
BOSTON BROADCASTERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHDH, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 13, 1970.

OPINIONS BELOW

Judicial Opinions: The opinion of the court below, as twice amended after the filing of petitions for rehearing (Appendix A, *infra,* pp. 1a-43a), has not yet been reported. The opinion of the court below denying a remand (Appendix H, *infra*) has similarly not been reported.[1]

Earlier reported opinions in this case are *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55 (D.C. Cir., 1958); *Massachusetts Bay Telecasters* v. *FCC,* 295 F.2d 131 (D.C. Cir., 1961), certiorari denied, 366 U.S. 918 (No. 838, O.T. 1960); and *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552 (D.C. Cir., 1964) (Appendix C, *infra,* pp. 47a-51a).

FCC Decisions: The FCC decision that was the subject of review in the opinion of the court below is reported at 16 FCC 2d 1 (1969) and is set forth in Appendix D(1) *infra,* pp. 52a-79a; it dealt with the initial decision of the Hearing Examiner reported at 16 FCC 2d 29 (1966) that is contained in Appendix D(2) *infra,* pp. 80a-305a. The FCC decision on reconsideration, reported at 17 FCC 2d 856 (1969) is set forth in Appendix D(3) *infra,* pp. 306a-325a.

The FCC decision that was reviewed in *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55, is reported at 22 FCC 767 (1957).

Following the remand directed by the court in 261 F.2d 55, there were further proceedings before the Commission, reported at 18 R.R. 1101 (1959), 29 FCC 204 (1960) and 29 FCC 986 (1960). But the FCC Re-

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[1] Appendices A-G to this petition are bound under a separate cover. Appendix H, which was not available until after the first seven appendices had been printed, is bound together with the petition.

port and Recommendation that was approved in *Massachusetts Bay Telecasters* v. *FCC,* 295 F.2d 131, certiorari denied, 366 U.S. 918, is not reported, and is available only in Pet. App. 120a-124a, No. 838, Oct. Term 1960.

The FCC decision reported at 33 FCC 449 (1962) was remanded for a limited purpose in *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552; it is one of the decisions still involved in the consolidated appeal now presented. It is accordingly set forth in Appendix D(4), *infra,* pp. 326a-344a, together with the FCC decision on rehearing, reported at 34 FCC 537 and contained in Appendix D(5), *infra,* pp. 345a-349a.

FCC Policy Statements. The FCC *Policy Statement on Comparative Broadcast Hearings,* reported at 1 FCC 2d 393 (1965) is set forth in Appendix E, *infra,* pp. 350a-372a.

The FCC *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants,* reported at 22 FCC 2d 424 (1970) is set forth in Appendix F, *infra,* pp. 373a-382a.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra,* p. 44a) was entered on November 13, 1970. WHDH's petition for rehearing was denied on February 16, 1971 (Appendix B(2), *infra,* pp. 44a-46a). A motion to remand the case to the Commission based upon newly discovered evidence indicating that Commissioner Wadsworth had rejected the rationale of his two colleagues was denied on April 15, 1971 (Appendix H, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and 47 U.S.C. § 402(j).

QUESTIONS PRESENTED

1. Whether the decision of the Federal Communications Commission in this case set out any adequate justification for treating petitioner, an applicant for renewal of its television broadcasting license, on a wholly different basis from all other renewal applicants in the preceding 35 years and on the same wholly different basis from all subsequent renewal applicants.

2. Whether the reviewing court which affirmed the foregoing obviously discriminatory treatment of petitioner was justified in doing so on grounds that were not only not espoused by the Commission but were either specifically rejected or else expressly not decided by the Commission.

STATUTES AND FCC RULES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*), and of the FCC Rules, are set forth in Appendix G, *infra,* pp. 383a-386a.

STATEMENT

The following recital, of necessity severely abbreviated because of the long duration of the controversy over Channel 5-TV in Boston, sets forth sufficient facts to indicate how the questions now presented arose.

A. The Earlier Proceedings

WHDH, Inc., a Boston radio licensee that was acquired by the Herald-Traveler Corporation in 1946, applied for television facilities in 1947. After extensive proceedings before the FCC, hereinafter simply the Commission, WHDH was chosen over three competitors and was granted a construction permit in 1957 (22 FCC 767); it began TV broadcasting the same year. On appeal, the District of Columbia Circuit

affirmed the Commission, saying that "We thus rule definitively so that repose may enfold this litigation if the steps next to be prescribed shall disclose no vitiating developments." *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55, 65 (D.C. Cir., 1958). The court on the basis of extra record information remanded the case to the Commission for evidentiary hearing and its determination whether Robert Choate of WHDH had, during the pendency of the proceedings before it, improperly approached any of the Commissioners.

The matter was referred to a special Hearing Examiner, the Hon. Horace Stern, a former Chief Justice of Pennsylvania, who found that Choate had had two luncheons (over a year apart) with then Chairman McConnaughey, both in public hotel dining rooms, as the guest of a mutual friend and with a fourth person present at the second one, and that there was no discussion of the merits of the television case on either occasion. He also found as a fact (18 R.R. 1101, 1108 (1959)) that "there is not a shred of credible evidence that there was any attempt there on the part of Choate to present the merits of the Herald application, the qualifications of the Herald organization, or anything in derogation of the other applicants,—in short, nothing that either in law or codes of professional or judicial ethics could justifiably be regarded as impairing the validity or propriety of the award which was subsequently made by the Commission."

The Commission, however, while finding "no cause to disturb the Examiner's basic findings as to the honesty of the witnesses," none the less did "not believe that all of the witnesses disclosed fully their actions and motives" (29 FCC 204, 207 (1960)), and accordingly proceeded to hold, dehors the record, that Choate was motivated by an attempt to influence the

outcome of the case. It therefore purported to vacate and set aside its earlier 1957 order that had granted a construction permit to WHDH, and directed a comparative reevaluation of the applicants concerned (29 FCC 204).

This order was stayed on the court's own motion and was never directly reviewed. Instead, the Commission issued an unreported Report and Recommendation (available at Pet. App. 120a-124a, No. 838, Oct. Term 1960) to the same effect, which the court then approved—but without having record, briefs or a hearing thereon. *Massachusetts Bay Telecasters* v. *FCC,* 295 F.2d 131 (D.C. Cir. 1961), certiorari denied, 366 U.S. 918 (No. 838, Oct. Term 1960).

Following briefs and oral argument, the Commission, on September 26, 1962, reinstated the construction permit to WHDH, but because of the fact that WHDH had by then been actually operating for more than the maximum statutory three year license period and also because of Mr. Choate's actions, made a grant to WHDH of an operating license for 4 months (33 FCC 449, 454; Appendix D(4), *infra,* p. 331a) rather than for the six months remaining in the regular period, *i.e.,* until the prescribed license expiration date for the New England region. 47 CFR 73.34(a)(8), Appendix G, *infra,* p. 385a.

WHDH filed for renewal on October 25, 1962, 90 days prior to the expiration of its four-month license as provided by § 1.539(a) (then § 1.328(a)) of the Commission's rules (Appendix G, *infra,* p. 385a). This rule, coupled with 47 U.S.C. § 307(e)[2] prohibiting Com-

[2] 47 U.S.C. 307(e) reads: "No renewal of an existing station license in the broadcast or the common carrier services shall be granted more than thirty days prior to the expiration of the original license."

mission grant of such application earlier than 30 days prior to its termination date, provided a minimum 60 day period during which any competing applicant could file with assurance of receiving comparative consideration. "Commission rules to the contrary, if any, notwithstanding" the Commission issued a general invitation for applicants filing before March 26, 1963 to participate in a comparative hearing, thereby giving them an unprecedented 150 days after the filing of the WHDH renewal application to do so. 25 R.R. 80 (1962). Three applicants, Boston Broadcasters, Inc. (BBI), Charles River Civic Television, Inc., and Greater Boston TV Co., Inc., took advantage of this extended invitation and filed competing applications.

WHDH and one of the unsuccessful applicants appealed the decision reported at 33 FCC 449 (1962), the former challenging only the conclusion of impropriety on Choate's part.[3] While those appeals were pending and while the renewal comparative hearing was in progress before the Commission, Choate died, whereupon the court in April 1964 remanded the case to determine what effect that circumstance would have on the awards, authorizing the Commission to combine the remand proceedings with the pending comparative renewal hearing which had commenced in November 1963. *Greater Boston Television Corp.* v. *FCC,* 334 F.2d 552 (D.C. Cir., 1964) (Appendix C, *infra,* p. 47a). The Commission ordered a consolidation for limited evidentiary purposes only (Appendix D(1), *infra,* ¶ 2, pp. 53a-54a).

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[3] The statement in the opinion below (Appendix A, *infra,* p. 7a), to the effect that WHDH also protested the short term of the license, is in error; the briefs filed in those cases (C.A. D.C., Nos. 17785 and 17788) show that WHDH addressed itself only to the Commission's conclusion that there had been an improper attempt to influence its proceedings.

B. The Current Comparative Proceeding Before the Commission

1. *The Hearing Examiner's Initial Decision*

Extensive hearings were held before the Examiner; between November 21, 1963, and July 16, 1965, there were 169 days of hearing sessions. On August 10, 1966, Hearing Examiner Herbert Sharfman issued an elaborate Initial Decision, in favor of granting the renewal to WHDH (16 FCC 2d 29; *infra,* Appendix D (2), pp. 80a-305a).

The Hearing Examiner held that "because of Mr. Choate's death his *ex parte* contacts are no longer a factor in the comparative consideration" (App. D(2), *infra,* ¶ 739, at 278a), observing that "in the circumstances it would be almost sadistic to perpetuate a curse against a corporation for something which had not helped but had hurt it merely—for it comes down to this—to demonstrate the inviolability of the Commission's procedures. Such Biblical fury is not properly a part of the administrative process." (*id.,* ¶ 738, at 278a).

The Hearing Examiner then went on to hold that WHDH had successfully met all of the issues designated by the Commission and by its Review Board, and that BBI had failed to do so. See his Summation, App. D(2), ¶¶ 787-801 at 297a-302a, which summarizes masses of detailed factual data.

The Hearing Examiner proceeded throughout on the footing that a comparative proceeding between an existing licensee seeking to have his license renewed and applicants for initial authorization differed substantially from a comparative proceeding between new applicants for original authority to broadcast. In the all new applicant comparative proceeding, there

was of course no prior performance, so that the question of who would best foster the public interest in the future necessarily rested on competing promises, and hence was essentially speculative. Where however a renewal was in question, there was direct evidence of past performance, and speculation was unnecessary. Specifically as applied to the newspaper ownership of television facilities, in a renewal proceeding it can be objectively determined whether such joint ownership in fact adversely affected performance, whereas in a comparative proceeding between new applicants the significance and potential of such joint ownership, although not controlling, might well loom larger if more speculatively. *Massachusetts Bay Telecasters, supra,* 261 F.2d at 64.

In thus approaching the case on the basis of an essential difference between comparative proceedings involving only applicants for initial authorization and those involving an applicant for renewal of license, the Hearing Examiner was following a Commission policy first promulgated in 1951, following a court decision twenty one years earlier. *Hearst Radio, Inc. (WBAL),* 16 FCC 141 (1951); *Wabash Valley Broadcasting Corporation (WTHI-TV),* 35 FCC 677 (1963); *Chicago Federation of Labor* v. *FRC,* 41 F.2d 422 (D.C. Cir., 1930).

After the close of the evidentiary record before the Hearing Examiner, on July 16, 1965, the Commission had announced a modified codification of its criteria for comparative hearings involving only applicants for initial authorization. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965); *infra,* Appendix E, pp. 350a-372a. That Policy Statement commenced with a declaration that "One of the Commission's primary responsibilities is to choose

among qualified new applicants for the same broadcast facilities," followed by the immediate caveat that "This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license." That Policy Statement was issued on July 28, 1965, twelve days after the evidentiary record herein was closed; the caveat was reaffirmed on June 8, 1966, when the Commission said "That remains our position" (*RKO General,* (KHJ-TV), 31 Fed. Reg. 8253); and the Hearing Examiner in this case issued his Initial Decision two months thereafter, on August 10, 1966.

Accordingly, the Hearing Examiner concluded his Initial Decision—which extends to over 235 pages in the FCC Reports—with an order that reaffirmed the Commission's decision of September 26, 1962 (*supra,* p. 6) to reinstate the construction permit to WHDH, and that granted WHDH's application for a renewal of its license for the regular period, rejecting the three competing applications (App. D(2), ¶ 802, pp. 302a-303a).

2. *The Commission's Decision*

A minority of the Commission—three Commissioners abstained or were absent, and one of the remaining four dissented—while accepting substantially all of the Examiner's findings of fact (App. D(1), ¶ 5, p. 55a), and, conceding (*id.* ¶ 18, at p. 60a) that his decision to grant renewal to WHDH was correct under the policy promulgated in the *Hearst* and *Wabash* decisions, (*supra,* p. 9), stated that those decisions would no longer be followed in comparative proceedings involving new and renewal applicants (*id.,* ¶¶ 18, 19, pp. 60a-61a), held that renewal applicants should be treated like new applicants, therefore held that for the future

the 1965 Policy Statement contrary to its terms should apply to new applicant-renewal situations as well as to all new applicant cases, and under that Policy Statement refused to give any comparative consideration to WHDH's admittedly "favorable" past broadcast record (*id.*, ¶ 23, at p. 62a). It thereupon found that WHDH should lose out to BBI because it was newspaper owned and had a lesser degree of integration of ownership and management, and on that basis ordered (App. D(1), ¶ 55, at pp. 70a-71a):

> "That the application of Boston Broadcasters, Inc. for a construction permit for a new television broadcast station to operate on channel 5 in Boston, Mass., *Is granted;* that the application of WHDH, Inc. for renewal of license of station WHDH-TV *Is denied;* and that the applications of Charles River Civic Television, Inc. and Greater Boston TV Co., Inc. for construction permits for a new television broadcast station to operate on channel 5 in Boston, Mass., *Are denied.*"

The Commission explicitly refrained from passing on whether Choate's death abated the demerit charged against WHDH because of his two meetings with Chairman McConnaughey (*id.*, ¶ 14, p. 58a).

WHDH petitioned for rehearing, which was granted in minor part only, *i.e.*, in respect to one aspect of certain alleged unauthorized transfers of control of the Herald-Traveler Corporation, in asserted violation of 47 U.S.C. § 310(b), see Appendix D(3) *infra*, ¶¶ 13-18, at pp. 311a-314a; in all other respects it was denied and the earlier decision was reaffirmed.

The Commission then included in its decision on rehearing the following paragraph reciting factors which had induced BBI and two others to file competing applications; in view of the issues now presented, that

passage requires quotation in full (Appendix D(3) *infra*, ¶ 40, at pp. 322a-323a):

> "40. In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the '* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * *.' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license."

C. The Ruling of the Court Below

Two significant steps occurred, one during the pendency of WHDH's petition to the Commission for rehearing, the other during the pendency of WHDH's appeal to the court below.

1. The Pastore Bill, named for the Chairman of the Communications Subcommittee of the Senate Commerce Committee (S. 2004, 91st Congress, 1st session, April 29, 1968), and sponsored by 28 Senators (and by

over 100 Representatives, who introduced many similar or companion measures), proposed to require a two-hearing procedure, wherein the issue of renewal would be determined prior to and to the exclusion of the evaluation of new applications.

2. Thereafter, on January 15, 1970, the Commission issued a new Policy Statement (22 FCC 2d 424; Appendix F, *infra,* pp. 373a-382a), which provided that the renewal issue would be determined first, in a proceeding in which new applicants would be able to appear only to the extent of showing the licensee's shortcomings, and in which full comparative hearings would be held only on a showing that the licensee had failed to render a "substantial" service.

In its 1970 Policy Statement the Commission announced that, in order to insure predictability and stability and yet to retain an incentive for broadcasters to furnish good service and so to avoid further comparative hearings, a licensee with a record of solid and substantial service to the community and without substantial deficiencies, would be entitled to renewal even in the face of promises of superior performance by new applicants. It said: "This is not new policy. It was largely formulated in the leading decision in this field, *Hearst Radio, Inc., (WBAL),* 15 FCC 1149 (1951), . . . The WBAL policy was followed in *In re Wabash Valley Broadcasting Corp.,* 35 FCC 677 (1963) and cited with approval in recent actions (see, e.g., *In re Application of RKO General, Inc.,* FCC 69-1335, ¶ 8."[4] (Appendix F, *infra,* p. 374a).

[4] FCC 69-1335, adopted December 3, released December 11, 1969, is reported in 34 Fed. Reg. 19852-53. It recited, "Since this is a renewal-new applicant proceeding, RKO's past broadcast record during the previous license term, favorable and unfavorable, will be relevant, *Hearst Radio, Inc.,* 15 FCC 1149, 6 RR 994 (1951)."

In its 1970 Policy Statement, the Commission made clear that the "*WBAL* policy" would be applicable except in "those unusual cases, generally involving court remands, in which a renewal applicant is for *sui generis* reasons to be treated as a new applicant." Examples of such *sui generis* cases are *Lamar Life Broadcasting Co.*, licensee of Channel 3, Jackson, Mississippi; *Consolidated Nine, Inc.*, licensee of Channel 9, Orlando, Florida, and *Community First Corp.*, licensee of Channel 12, Jacksonville, Florida. The court below vacated these licenses. *Office of Communications of United Church of Christ* v. *FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Consolidated Nine, Inc.* v. *FCC*, 403 F.2d 585 (D.C. Cir. 1968); *Community First Corporation* v. *FCC*, 403 F.2d 578 (D.C. Cir. 1968). The Commission following these decisions provided for interim operation by an entity other than the previous licensee pending hearing and determination of comparative proceedings involving the former licensee and new applicants for each of the respective facilities. 26 FCC 2d 100 (1970); FCC 69-287, see 17 FCC 2d 482, n. 2 (1969); and FCC 69-286, see 17 FCC 2d 479, n. 3 (1969). In so doing, the Commission found Section 307(d) of the Act inapplicable.[5]

But, when *Consolidated Nine* and *Community First* were urged on the Commission in this case as authority for treating WHDH as a new applicant, terminating its operation on Channel 5 and authorizing "interim" operation thereon by a group composed of

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[5] The provision of 47 U.S.C. 307(d) (Appendix G, *infra*, p. 383a) that a licensee who files an application for renewal shall have his license continued in effect pending hearing and final determination on the renewal application, does not apply except in such a case.

all the applicants therefor, they were held inapposite on the stated ground that "Unlike the television station operators in those cases, WHDH here received a valid grant of a license even though such license was issued for a period of 4 months only, and that grant has not been vacated" (Appendix D(3), *infra,* ¶ 38, at pp. 321a-322a). And in not less than three other places in its May 19, 1969 ruling on rehearing in this case, and at least once at an earlier date (1964), the Commission reiterated that the application of WHDH was one for renewal of station license, that Section 307(d) applied to it, and that the Commission had dealt consistently with it on that footing (Appendix D(3), *infra,* ¶ 21, pp. 315a-316a; ¶ 37, p. 321a; ¶ 39, p. 322a).[6]

Nevertheless, the court below affirmed. It first generalized concerning "the Rule of Law" and "Administrative Law"—both capitalized, see Part II(A) of the opinion, Appendix A, *infra,* at pp. 15a-22a.

The court below then proceeded to justify the Commission's application of new not renewal applicant criteria to WHDH as appropriately "handcrafted" because "WHDH was neither a new applicant nor a renewal applicant" (Appendix A, *infra,* at p. 35a), and did so on the footing that the earlier proceedings dealing with Mr. Choate's actions warranted the Com-

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[6] The District of Columbia Circuit had previously held in the case of a comparative hearing involving renewal of a four month license, *Community Broadcasting Corp.* v. *FCC,* 363 F.2d 717, 720 (1966): "... there is, of course, nothing in the statute which prescribes that an initial grant shall be for one, twelve, or thirty-six months. For the period of the grant, whatever it may be, the licensee who has been found qualified is like any other, except in the knowledge that renewal must be accomplished at an earlier date."

mission in doing what it explicitly said it did not do, *i.e.* use "the tainted overtures of WHDH as a reason for fresh consideration of all applicants" (Appendix A, *infra,* p. 31a), and on that basis (*id.* at p. 34a) "to hold WHDH to a higher comparative standard than that required of renewal applicants generally." The court below so held despite the Commission's express holding that it was "unnecessary" to disturb the Examiner's conclusion that "because of Mr. Choate's death his *ex parte* contacts are no longer a factor in the comparative evaluation" (Appendix D(1), *infra,* ¶ 14, p. 58a), followed by its express refusal to do so in denying rehearing to BBI and Charles River (Appendix D(3), *infra,* ¶ 23, p. 316a).

Accordingly, the court below affirmed, and in due course denied rehearing (Appendix B(2), *infra,* pp. 44a-46a).

REASONS FOR GRANTING THE WRIT

This is a case—in the interest of maintaining poise, we deem it preferable to quote the conclusion of an outsider who is alike objective, learned, and distinguished—this is a case in which "the Commission, overturning its practice of decades—a practice upon which the economics of the broadcasting industry has been built—decided that a broadcaster's license would be up for grabs every three years! * * * In WHDH there was no finding [by the Commission] that the licensee had misbehaved or that its programs were deficient; simply a determination that a competing applicant was preferable because WHDH was owned by a newspaper and it was not. The objective of diversifying the media is absolutely sound, and in an initial contest for a license there is a valid basis for preferring an independent to a newspaper-owned applicant. * * * But

to license a newspaper-owned broadcaster and then after the investment is made to forfeit it to a newcomer is inexcusable. It is inequitable and functionally unsound."[7]

The Pastore bill and its counterparts reflected legislative agreement with the foregoing views, and on January 14, 1970, in order to allay further criticism, the Commission adopted a *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants* (22 FCC 2d 424; Appendix F, *infra,* pp. 373a-382a). This new policy reinstated the *Hearst* and *Wabash* doctrine that the rump Commission in the WHDH case had refused to follow, so that thereafter criteria appropriate for new applicant comparisons would not be applied in renewal proceedings.

But—the 1970 Policy Statement did not give WHDH the benefit of this return to established principles. Consequently WHDH stands as the only licensee with a valid existing license that has ever been given comparative consideration under the criteria reserved for initial applicants in the Commission's entire history.

On top of that, the Commission's inexcusable and inequitable action in this case—the characterizations are Professor Jaffe's—was compounded by the decision below, which not only sustained the Commission's treatment of WHDH under standards different from those applied to any renewal applicants before or since,

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[7] L. L. Jaffe, *We Need The Pastore Bill,* The New Republic, December 6, 1969, p. 14 at p. 15. The writer, Byrne Professor of Administrative Law at Harvard, and author of a standard text, *Judicial Control of Administrative Actions* (1965) had earlier expressed concern over the Commission's decision. WHDH: *The FCC and Broadcasting License Renewals,* 82 Harv. L. Rev. 1693 (June, 1969).

but, using a technique of review that this Court has repeatedly condemned, rested such justification on one ground that the Commission not only did not itself espouse but indeed specifically refrained from discussing, and then on another that the Commission had repeatedly rejected in this very proceeding.

First. In this petition we do not ask that the Court review the wisdom or otherwise of Commission policies relative to joint versus separate ownership of newspaper and television facilities; those can be left to legislative oversight. What we challenge here is simply the power of the Commission to change its criteria for renewal in midstream, so that one rule for renewal applies to this petitioner while a wholly different rule was applicable to all others before then and was thereafter reapplied to all others. The court below avoided the challenge, saying, "Fortunately, the present posture of this case permits us to refer to these problems as matters that are not involved in our decision." (Appendix A, *infra,* p. 24a). The court below then purported to find in ¶ 40 of the Commission's rehearing decision (quoted *supra,* p. 12) a basis for saying that the Commission had not treated WHDH as a renewal applicant, and this despite the Commission's failure to say anything remotely resembling that in ¶ 40 and despite its repeated categorical contrary holdings.

Such action cannot be sugar-coated by generalized homilies about "the Rule of Law" or "Administrative Law," here capitalized by way of beatification if not of canonization (Appendix A, *infra,* pp. 15a, 20a). Such action, making a particular set of criteria for judgment applicable to only a single litigant, has passed well beyond the boundary of allowable discre-

tion into the area of tyranny. It is well, therefore, to recall what some members of this Court said two decades ago (*United States* v. *Wunderlich,* 342 U.S. 98, 101):

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

No amount of verbiage, no collection of abstract platitudes, no stringing together of pious homilies, can conceal the fact, which indeed appears plainly and without dispute from the opinion below, that (1) the Commission since 1951 had consistently ruled that renewal proceedings were not to be turned into *ab initio* comparative proceedings (*Hearst Radio, Inc. (WBAL),* 16 FCC 141 (1951); *Wabash Valley Broadcasting Corp. (WTHI-TV),* 35 FCC 677 (1963)); that (2) the Commission reaffirmed this precise position when it specifically declared inapplicable to renewal proceedings its 1965 Policy Statement on Comparative Broadcast Hearings (1 FCC 2d 393; Appendix E, *infra,* p. 350a); that (3) when the Hearing Examiner in this case applied the established *"WBAL* policy" to WHDH he was reversed by three members of the Commission (16 FCC 2d 1; Appendix D(1), *infra*); and that (4) the Commission in 1969, and in 1970 again reaffirmed (by a six-to-one vote) the *WBAL* policy for all renewal applicants—all except WHDH (22 FCC 2d 424; Appendix F, *infra,* at pp. 373a-382a).

Or, more briefly stated, WHDH has been singled out as the only renewal applicant in the thirty-five year history of the Commission to be denied renewal rights. And, most shocking of all, such crass administrative discrimination has now received the imprimatur of judicial approval.

It may well be, as the court below appeared to rationalize, that "some things are bound to happen for the 'first time' " (Appendix A, *infra,* p. 35a). But it is surely a repudiation of the very essence of justice according to law when, as here, something happens for the only time.

Second. This Court has repeatedly ruled that agency action must stand or fall solely on the grounds invoked by the agency, and that a reviewing court is powerless to affirm such action by substituting another basis.

The first formulation of this principle appears in the first *Chenery* case (*SEC* v. *Chenery Corp.,* 318 U.S. 80, 87):

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

A more detailed restatement of the same doctrine was set forth in the second *Chenery* case (*SEC* v. *Chenery Corp.,* 332 U.S. 194, 196), as follows:

> "* * * a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

Then, more recently, the Court was required to reaffirm the foregoing rule (*Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-169):

> "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself: [Repeating the quotation from second *Chenery* set out immediately above.] For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U.S. at 196."

But this thrice forbidden course was precisely the one taken by the court below, which rested its approval of the Commission's grossly discriminatory action on two different grounds, neither of which had been espoused by the Commission: The Commission had specifically refused to determine the first ground relied on by the court, while the second ground on which the court proceeded had been considered by the Commission and had been expressly and repeatedly rejected by it.

The court below first undertook to sustain the Commission's palpable discrimination against WHDH by exhuming the details of Mr. Choate's conduct, which it characterized as "the tainted overtures of WHDH" (Appendix A, *infra,* pp. 26a-33a) and this although the Commission itself had never relied on that factor either in its original January 1969 decision or in its May 1969 determination on rehearing.

The Hearing Examiner found specifically that all traces of Choate's activities had evaporated, and that to resurrect them now "would be almost sadistic" would "perpetuate a curse," that it would be simply "Biblical fury," and that it "would serve no prophylactic but only an emptily minatory purpose" (Appendix D(2), *infra,* ¶ 738, at 278a).

The Commission in its original decision expressly declined decision on this issue (Appendix D(1), *infra,* ¶ 14, at p. 58a), and in its ¶ 23 on rehearing (Appendix D(3), *infra,* at p. 316a), again refused to consider it.

Accordingly, in justifying the Commission's discriminatory treatment of WHDH on the basis of Choate's conduct, the court below flouted the principle laid down here in both *Chenery* cases and in the more recent *Burlington Truck Lines* decision.

Reliance on the acts of a dead man is the more unjustified in the present case in view of a recent ruling here that followed the decision below.

In *Durham* v. *United States,* No. 5298, this Term, decided March 8, 1971, this Court held that, where a criminal defendant whose conviction had been affirmed petitioned for certiorari and died while such petition was pending, the proper course was to vacate the judgment of affirmance and to dismiss the indictment. But in the present case Mr. Choate's death, far from persuading the court below to dismiss the charges against him, induced that tribunal to reinstate those charges and to give them controlling effect—even though the Commission made a particular point of not even passing on them as necessary to the result it reached.

The second violation of the *Chenery-Burlington* doctrine on the part of the court below involved its holding that WHDH was not a renewal applicant (Appendix A, *infra,* at p. 35a).

The Commission, however, had not only repeatedly refused so to rule, but on the contrary had repeatedly ruled that WHDH was a renewal applicant and was entitled to be treated as one. The exception in its 1970 Policy Statement for certain "renewal" applicants whose cases were to be treated as though they were new applicants dealt only with stations whose licenses had actually been cancelled. See discussion and full references at pp. 14-15, *supra,* all of which demonstrate conclusively not only that the *sui generis* exception in the Commission's 1970 Policy Statement (22 FCC 2d at 430; *infra,* Appendix F, at p. 379a) did not apply to a station in WHDH's situation, but also that the Commission had repeatedly and specifically so held in this very case.

Yet the rationale adopted by the court below was that WHDH was not a renewal applicant (Appendix A, *infra,* at pp. 32a-35a). This was a rationale not supported by ¶ 40 of the Commission's decision on rehearing, and wholly contrary to the Commission's rationale in its main and rehearing decisions of January and May 1969. Hence it was not a permissible ground for affirmance under *Chenery* and *Burlington Truck Lines.*

Third. The crying unfairness of what was done in this case is highlighted by three additional factors that require brief mention.

1. The court below dwelled at some length on the conclusions arrived at by the Commission on July 14, 1960, to the effect that Choate had "demonstrated an attempted pattern of influence" (29 FCC 204, 211-212), and indeed quoted extensively from them (Appendix A, *infra,* pp. 27a-29a).

But the quoted conclusions were never the subject of judicial review! What was approved in the decision in 295 F.2d 131 was not the July 1960 Commission action now quoted by the court below, but rather the unreported Report and Recommendations dated November 1960 (Pet. App. 120a-124a, No. 838, Oct. T. 1960), and that approval was entered November 1960 (Pet. App. 120a-124a, No. 838, Oct. T. 1960) without granting WHDH a hearing of any kind.[8] When WHDH thereupon sought review here because of precisely such refusal to hear before deciding, the Commission opposed review on the footing that the order assailed by WHDH was "interlocutory" (Br. Op. 9, No. 838, Oct. T. 1960); and certiorari was denied, 366 U.S. 918.

Consequently the court below in this case has not only rested its approval of the Commission's discriminatory action on a ground expressly rejected by the Commission, but the ground that it relied upon—the Commission's July and November 1960 conclusions—have never yet been examined in the orderly processes of judicial review.

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[8] The Solicitor General in his brief for the Commission opposing certiorari in No. 838, Oct. Term 1960, admitted that (p. 13) "the court itself has not passed upon the evidence or the findings which led the Commission to conclude that a new hearing should be held." In footnote 5, he added, "the Commission record on remand was not before the court when it adopted the order here in question."

2. In April 1964, in the decision that is reported at 334 F.2d 552 (Appendix C, *infra,* p. 47a), the court below remanded the case to the Commission to determine the effect of Mr. Choate's death, both in respect of the earlier demerit arising from his conduct as well as in respect of the favorable factors stemming from his knowledgeable broadcasting activities as chief executive of WHDH-AM, saying that (334 F.2d at 554; *infra,* p. 50a) "Obviously the resultant net assay is initially for the Commission."

But, as has been shown, the Commission never made the assay; the Commission held only that since Choate's death did not, for the reasons given by the Examiner, cancel the favorable factors (Appendix D(3), ¶ 21, at pp. 315a-316a), no modification of its September 26, 1962 decision was necessary. It explicitly refused to make any determination of the effect of Choate's death on the unfavorable factor.

Consequently, the case in its present posture stands as one where the reviewing court, faced with a studied refusal on the part of the agency to make such a determination, despite the court's remand for that specific purpose, nearly seven years later (during all of which time WHDH has been on the air), elected to substitute itself for the Commission and make its own determination in the first instance.[9]

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[9] Notwithstanding the *sua sponte* consolidation of the three appeals from the Commission's 1969 decision with the two appeals that had been remanded in 1964 pursuant to the decision in 334 F. 2d. 552, the court below did not have before it the record on remand dealing with the effect of Choate's death on the "*ex parte*" demerit, refused to order the Commission to produce it, and denied requests to have the issues briefed.

It would surely be difficult as an original proposition to find a more egregious flouting of the long established guideline that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice and [that] the appropriate independence of each should be respected by the other." *United States* v. *Morgan,* 313 U.S. 409, 422.

3. The Commission in its ¶ 40 on rehearing noted the circumstance that WHDH's license was granted only for 4 months rather than for the regular period, and this theme is elaborated in the opinion below (Appendix A, *infra,* pp. 30a, 32a).

But the fact is that if WHDH had been granted a license for "the regular period" on September 26, 1962, it would have received, not a 3-year license, but only a 6-month license rather than the one for 4 months that it received. See p. 6, *supra.*

Yet this 2-month curtailment has been blown up to the point where it has now been held to justify and to legalize one of the most utterly discriminatory agency actions in the books, one which arbitrarily destroys a TV station that for nearly 14 years has given its community satisfactory service in the public interest.

Fourth. The Commission will doubtless oppose this petition on two grounds, first that this is a unique case, second that it can never recur, so that on either basis the matter lacks the necessary public interest to warrant this Court's attention.

We agree fully that this case can never recur; the Commission's Policy Statement of January 1970 (22 FCC 2d 424; Appendix F, *infra,* p. 373a) insures

against similar arbitrariness in the future, which of course explains why the Pastore bill was not reintroduced in the 92d Congress: There was no longer any need to do so after issuance of the cited 1970 Policy Statement.

We agree also that this is indeed a unique case. Indeed, it is the gravamen of our complaint that WHDH has been treated differently from every other renewal applicant in the thirty-five year history of the Commission. Such arbitrary discrimination is itself a ground for review, for certainly in the past this Court has regularly reviewed gross and indeed shocking injustices that happily might never recur. E.g., *Ziang Sung Wan* v. *United States,* 266 U.S. 1; *White* v. *Texas,* 310 U.S. 530; *Vitarelli* v. *Seaton,* 359 U.S. 535; *Thompson* v. *Louisville,* 362 U.S. 199; *Greene* v. *United States,* 376 U.S. 149; *Brooks* v. *Florida,* 389 U.S. 413.

While the foregoing listing includes criminal cases, the principle of those decisions is one of universal application. For it is precisely the circumstance of unique but overwhelming injustice that underlies the "so far departed from the accepted and usual course of judicial proceedings" clause, now in Rule 19(1)(b) (398 U.S. at 1030), that has been in this Court's Rules unchanged for over 45 years; see Rule 35(5)(b) of 1925, 266 U.S. at 681. And here the departure is underscored by the circumstance that what was done below in this case flew in the face of settled rulings of this Court forbidding reviewing tribunals from affirming agency action on grounds not espoused by the agency itself.

CONCLUSION

This case cannot fairly be characterized other than as a blot on, and a grievous injury to, the administrative process. The present petition for certiorari should therefore be granted.

Respectfully submitted.

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APRIL 1971.

APPENDIX

APPENDIX H

OPINION AND ORDER DENYING WHDH'S MOTION TO REMAND

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1970

No. 17,785

GREATER BOSTON TELEVISION CORPORATION, *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WHDH, INC., a Massachusetts Corp., *Intervenor*

No. 17,788

WHDH, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
GREATER BOSTON TELEVISION CORPORATION, a Massachusetts Corporation, *Intervenor*

No. 23,154

CHARLES RIVER CIVIC TELEVISION, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee,*
WHDH, INC., *Intervenor,*
BOSTON BROADCASTERS INC., *Intervenor*

H2

No. 23,159

WHDH, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
BOSTON BROADCASTERS INC., *Intervenor*

No. 23,172

GREATER BOSTON TV CO., INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*,
WHDH, INC., *Intervenor*,
BOSTON BROADCASTERS INC., *Intervenor*

ORDER DENYING MOTION OF WHDH TO REMAND, DENYING MOTION OF CHARLES RIVER CIVIC TELEVISION, INC. FOR INTERIM RELIEF, DENYING MOTION OF BOSTON BROADCASTERS INC. FOR CLARIFICATION OF ORDER OF FEBRUARY 16, 1971, AND GRANTING IN PART THE MOTION OF WHDH, INC. FOR CONDITIONAL ENLARGEMENT OF TIME OF STAY

Before: TAMM, LEVENTHAL and MACKINNON,
Circuit Judges

ORDER

On consideration of the motion: 1. of WHDH to remand; 2. of Charles River Civic Television, Inc. for interim relief; 3. of Boston Broadcasters Inc. for clarification of this Court's order of February 16, 1971, and; 4. of WHDH

for conditional enlargement of time of stay, and of the responsive pleadings filed with respect to the foregoing, it is

ORDERED by the Court that the motion of WHDH to remand is denied for the reasons set forth in the attached opinion filed herein this date, and it is

FURTHER ORDERED by the Court that the motion of Charles River Civic Television Inc. for interim relief is denied, and it is

FURTHER ORDERED by the Court that the motion of Boston Broadcasters Inc. for clarification of this Court's order of February 16, 1971, is denied, and it is

FURTHER ORDERED by the Court that the motion of WHDH for conditional enlargement of time of stay is granted in part, to provide that the stay will stand revoked unless WHDH files a petition for certiorari on or before April 23, 1971. The court is of the view that appellant has had sufficient time to prepare its petition for certiorari, and this April 23 date is the latest date which this court can be confident will permit Supreme Court disposition this term.

Per Curiam

No.
17,785—Greater Boston Television Corporation v.
17,788 FCC
23,154
23,159
23,172

Before TAMM, LEVENTHAL and MACKINNON,
Circuit Judges.

Opinion on Motion To Remand

Per Curiam:

WHDH, Inc. disclaims any intention to ask this Court to review the FCC Memorandum Opinion and Order, adopted March 3, 1971, which denied its Petition to Request Remand, that the Commission apply to this Court for an order remanding the case to the Commission. Technically that is correct, since the application to the Commission was only that it take such action in its capacity as a litigant before this court. In any substantial aspect of the matter, however, this court is being asked to remand the case although the Commission opposes a remand. That is within our power, and perhaps even duty, if we determine that the state of the record is such as may preclude a just result.[1]

The elements of a just result embrace consideration of both the correct disposition of an individual case and sound rules of administration broadly applicable to both agencies and courts to provide dispositions that are in the interest of justice. Essentially WHDH is asking this court to direct the agency to reopen its record. The provision of 28 U.S.C. § 2347(c) not only confirms the authority to take such action, previously voiced by this court (see note 1) but also precludes reopening action

[1] Fleming v. FCC, 96 U.S.App.D.C. 223, 225 F2d 523 (1955).

by the Commission in the absence of this Court's order.[2] But in exercising its authority this court properly takes into account the views of the agency, especially where, as here, those views are contained in a formal order, accompanied by reasons, declining to request this court to order a remand.

A party seeking remand from a court of appeals in the face of an agency order declining to seek remand has at least as much burden as a party seeking reversal of a decision to deny reopening made by the agency prior to the institution of court action. It is a rule of administration tantamount almost to a rule of necessity that rehearings before an agency require exercise of discretion. A litigant's claim that "some new circumstance has arisen, some new trend has been observed, or some new fact discovered," must overcome the necessity for a rule of finality, and the need to avoid reopenings that "stall the enforcement of the administrative order."[3]

Courts have been liberal to provide remands on a substantial claim of action taken by an agency when one of its members was disqualified or under the impetus of an approach to the agency tainted by fraud, undue influence, ex parte representations and the like.[4] Such remand is responsive to the basic integrity of the administrative and judicial process.

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[2] American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 543 (1970).

[3] I.C.C. v. Jersey City, 322 U.S. 503, 514-515 (1944).

[4] WORZ, Inc. v. FCC, 358 U.S. 55 (1958), and on remand see WORZ, Inc. v. FCC, 106 U.S.App.D.C. 14, 268 F.2d 889 (1959); WKAT v. FCC, 103 U.S.App.D.C. 324, 258 F.2d 418 (1958); Massachusetts Bay Telecasters v. FCC, 104 U.S.App.D.C. 226, 237-38, 261 F.2d 55, 66-67 (1958) (interested attempts "to influence any member of the Commission . . . except by the recognized and public processes [go] to the very core of the Commission's quasi-judicial powers"); Sangamon Valley TV Corp. v. United States & FCC, 106 U.S.App.D.C. 30, 269 F.2d 221 (1959).

For that reason we have examined the material cited in the motion to remand filed by WHDH to consider the possibility that there should have been disqualification—a possibility touched on in movant's papers. We find no substantial issue on this score. WHDH attaches an article from the December 28, 1970-January 4, 1971 issue of Broadcasting purporting to quote statements from former Commissioner James Wadsworth concerning his vote against WHDH. This quotes Mr. Wadsworth as saying he had been subjected to an ex parte approach in a telephone call a few days before the Commission was to meet to instruct the staff in the case, and this left him warm on the subject. But the ex parte approach did not relate to the Boston TV case, and certainly could not reasonably be asserted to disqualify him or taint his vote.

WHDH raises another issue—that according to what Mr. Wadsworth now related to Broadcasting, if correctly reported, it may be that he did not join in the majority's findings on the *WHDH* case. WHDH says this possibility raises the question whether an agency's action can be supported by findings or a rationale not concurred in by a majority of the commissioners. That question was raised in a footnote in *ICC* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744, 751, fn. 8 (1963). In *Chicago, B. & Q. R. Co.* v. *United States*, 60 F. Supp. 580, 583 (3-judge court) (E.D. Ky. 1945) the court issued a ruling upholding the validity of an ICC decision signed by 4 out of 9 commissioners, the fifth stating he "concurred in the result".[5]

There would also arise the separate question whether a commissioner who purported to join in the majority

[5] The court interpreted that statement to mean that while this commissioner did not assent to all the comments or observations of the majority "he is, nevertheless, sufficiently in accord with the rationale of them to enable him to agree that Western Kentucky's rate to Chicago . . . is unreasonable to the extent stated and that an order for the future should be entered accordingly."

opinion and findings could impeach his action after his official standing came to an end.

This case has gone to a ruling. Rehearing has been denied. We could have terminated our stay forthwith, since it was granted to a party we ruled against on the merits. We continued the stay on condition a petition for certiorari was filed within 60 days from the denial of rehearing. Our assumption was that this would permit Supreme Court disposition this Term.

Some time litigation must come to an end. We are not to be taken as faulting counsel for WHDH for raising the question late. The failure of a litigant to raise a matter prior to the filing of an appeal in court cannot rightly be taken to foreclose him when the matter only arose after the filing of the appeal.[6] We do not even fault counsel for having applied in the first instance to the FCC to request a remand, instead of coming directly to this court which has the only jurisdiction to order the remand. This may well have represented a reasonable tactical decision. But when the motion comes to us at this late hour, and its granting would endanger vindication of the public interest as declared by the Commission in the decision affirmed by this court we would not feel justified in further delay unless we concluded that WHDH had a strong likelihood of prevailing on the merits. The consideration of the motion papers leaves us with the contrary conclusion, that the FCC's order denying the request that it seek remand is a sound exercise of discretion, and that the motion to remand should be denied.

In the article in Broadcasting Mr. Wadsworth is reported primarily as denying the imputation of Mr. Harold E. Clancy, president of Herald-Traveler Corp., based on the fact that Mr. Wadsworth's legal assistant, the late

[6] NLRB v. Jones & Laughlin Co., 331 U.S. 416, 427-28 (1947).

Joseph Kesler, before joining the FCC in 1966, had been employed by the firm that represented Boston Broadcasters, Inc. Mr. Wadsworth stated that Mr. Kesler had revealed his prior association to the Commissioner and had accordingly disqualified himself from giving any advice on the case. Mr. Clancy had raised a question whether Mr. Wadsworth had counseled with anyone else and Mr. Wadsworth said he had not before he voted.

The article then goes on to quote Mr. Wadsworth that his reason for voting against WHDH was the firm's attempt to exercise undue influence, and he said: "I don't care about the concentration-of-control question." But he did not add a separate statement as to his views for voting against WHDH, because this "didn't occur" to him, as no one had leveled an attack on him personally.

The Commission order said that it found the material presented by WHDH represented allegations based on double hearsay which are "procedurally defective, factually unpersuasive and legally an impermissible inquisition into the mental processes and motives of a decision maker." The Commission pointed out that Commissioner Wadsworth's joining the others was permissible for the same reason given by this court in sustaining the action of Commissioner Johnson in joining the decision of his fellow commissioners to avoid an impasse, that being accepted practice "at least assuming no violation of conscience is involved." While distinctions may be drawn between the two positions, we think this application of our decision is a tenable one, for we see no indication in the article that Mr. Wadsworth disavowed his official action in joining in the opinion prepared in accordance with the direction of the other commissioners, or that he considered it to violate his conscience, or that he did other than join in an opinion which was not his preference but which he was willing to accept for purpose of decision.

We turn to the question whether WHDH could seek to upset the award by hoping for testimony from Mr. Wadsworth that the reasons assigned by the Commission were not only different from the reasons he thought should govern but were reasons to which he was actually opposed. On this aspect of the case the FCC's order refusing to seek a remand, was predicated on the rule that in the absence of significant indication of misconduct or bias, courts will not permit the probing of the mental processes of a judge[7] of an administrative decision maker acting after a quasi-judicial proceeding.[8]

We are sufficiently satisfied with the FCC's disposition of this matter to say that we see no abuse of discretion or error that warrants the remand opposed by the FCC. We have already noted our readiness to undertake a remand in the interest of justice and to protect the integrity of the administrative and judicial process. But the remand sought here is for the purpose of probing the mental processes of a former commissioner. If such a probe is conducted in a case where it is not fully warranted,—by a categorical proffer of reliable evidence rooted in a sound legal principal—then the very conduct of the inquiry is one which compromises "the integrity of the administrative process."[9]

Motion to remand denied.

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[7] Fayweather v. Ritch, 195 U.S. 276, 306-07 (1904).

[8] United States v. Morgan, 313 U.S. 409, 422 (1941); Norris & Hirshberg v. SEC, 82 U.S.App.D.C. 32, 163 F.2d 689 (1947).

[9] United States v. Morgan, *supra*, 313 U.S. at 422.

INDEX

	Page
Questions Presented	1
Statement	4
Argument	4
I. The WHDH Petition (Case No. 1622)	5
A. The Commission's Treatment of WHDH As Not Being an Ordinary Renewal Applicant Was Fully Justified	7
B. WHDH Has Had Full Judicial Review of Its Arguments	11
C. In Its Review of the Commission's Decision the Court Below Followed the *Chenery* Doctrine Scrupulously	12
II. The Charles River Petition (Case No. 1708)	13
A. The Court Below Correctly Held That the Commission's Decision Was Supported by a Majority of a Quorum	13
B. There Was No Error by the Commission or the Court Below in Declining to Attribute General Unreliability to BBI Because it Was Assessed a "Slight Demerit Because of Its Insufficiently Supported Local Live Program Proposal"	15
III. Greater Boston's Petition (Case No. 1716)	16
A. There Was No Error by the Commission or the Court Below in Their Treatment in 1969 and 1970, Respectively, of Contentions of Greater Boston I Attacking the Validity of the Grant of a Four-Month License to WHDH in 1962	16
IV. Conclusion	18

AUTHORITIES CITED

Page

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Community Broadcasting Corporation v. *F.C.C.* 363 F.2d 717 (D.C. Cir., 1966) 6, 10
Community First Corporation v. *F.C.C.* 403 F.2d 578 (D.C. Cir., 1968) 6
Consolidated Nine, Inc. v. *F.C.C.* 403 F.2d 585 (D.C. Cir., 1968) 6
Securities and Exchange Commission v. *Chenery Corporation* 318 U.S. 80 (1943) and 332 U.S. 194 (1947) 13
South Florida Television Corp. v. *F.C.C.* 349 F.2d 971 (D.C. Cir., 1965); cert. denied 382 U.S. 987 (1966) 6, 10
WKAT, Inc. v. *F.C.C.* 258 F.2d 418 (D.C. Cir., 1958) .. 6

MISCELLANEOUS:

Policy Statement on Comparative Hearings Involving Regular Renewal Applications 22 FCC 2d 424 (1970) 9

FCC DECISIONS:

BEST, et al. 21 FCC 2d 355 (1970) 9, 12
Biscayne Television Corp. 31 FCC 237 (1961) 6
Sunbeam Television Corporation 38 FCC 805 (1965) 10
WHDH, Inc. 20 Pike & Fischer Radio Regulations 410e (1961) 12
L.B. Wilson, Inc. 37 FCC 511 (1964) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., CHARLES RIVER CIVIC TELEVISION, INC., AND BOSTON BROADCASTERS, INC., *Respondents*

No. 1708

CHARLES RIVER CIVIC TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., BOSTON BROADCASTERS, INC., WHDH, INC., *Respondents*

No. 1716

GREATER BOSTON TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WHDH, INC., *Respondents*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT BOSTON BROADCASTERS, INC. IN OPPOSITION

QUESTIONS PRESENTED

Following administrative proceedings originally commenced in 1954 to select a licensee to operate a tele-

vision station on Channel 5 in Boston, WHDH, Inc., received a construction permit in 1957 and began broadcasting that year, continuing to the present time. The construction permit was later set aside by the Commission because of the discovery in 1958 (while an appeal from the Commission's decision was pending in the Court of Appeals) of *ex parte* contacts occurring in 1955 and 1956 between WHDH's President, Robert Choate, and the then FCC Chairman, while WHDH's application was in an adjudicatory posture before the Commission. WHDH has been operating the station since 1957 under a series of temporary authorizations and a license limited to four months because of the "inroads made by WHDH upon the rules governing fair and orderly adjudication." (App. D-4, p. 331a) In response to an invitation by the Commission, respondent BBI and others filed new applications in 1963 and, in January 1969, after protracted hearings, the Commission granted the application of BBI and denied the others. (App. D-1, p. 52a) The Court of Appeals sustained the Commission's decision in all respects. (App. A, p. 1a)

The question presented in the three petitions for certiorari filed by the unsuccessful applicants are:

No. 1622 (WHDH, Inc., Petitioner)

1. Whether the Commission and the court below were justified in using the "tainted overtures" of Petitioner WHDH and the resulting "inroads made by WHDH upon the rules governing fair and orderly adjudication" as a reason for treating its application for renewal of license as *sui generis,* and requiring it to undergo a full comparative

hearing with new applicants for the facility, rather than as a conventional licensee seeking renewal.

2. Whether the court below failed to judge the Commission's decision solely upon the grounds which the record discloses were invoked by the agency.

No. 1708 (Charles River Civic Television, Inc., Petitioner)

1. Whether the court below erred in declining to hold invalid a 3-1 decision of the seven-member Commission in favor of BBI where (a) the dissenting Commissioner voted to renew the WHDH license, two Commissioners joined in the published Decision in favor of BBI and the fourth Commissioner concurred because he deemed his "participation . . . necessary to constitute a working majority for decision" and (b) in disposing of a petition for rehearing filed by Charles River raising the quorum question, the fourth Commissioner joined in a denial of the petition without reservation.

2. Whether the court below erred in affirming the Commission's Decision granting BBI's application, despite a "slight demerit" assigned to BBI by the Commission because of insufficient substantiation of its program proposal.

No. 1716 (Greater Boston Television Corporation, Petitioner)

1. Whether the court below adequately reviewed and disposed of the Commission's 1962 Decision denying the application of Greater Boston Television Corporation.

STATEMENT

Respondent BBI adopts the Statement of the case set forth in the Brief of the Respondent Federal Communications Commission.

ARGUMENT

Apart from the other clear and compelling reasons for denying the writ, two considerations seem to us to be overriding: (1) the extraordinary longevity of this litigation, and (2) the meticulous care and concern manifested by the Court of Appeals that every contention advanced by the parties, no matter how insubstantial, be fully considered and determined in order that this litigation be brought to an early and definitive conclusion. "Some time litigation must come to an end." (App. H7). These were the words of the Court of Appeals in its opinion of April 15, 1971, denying WHDH's motion to remand. The Court also said:

> "This case has gone to a ruling. Rehearing has been denied. We could have terminated our stay forthwith, since it was granted to a party we ruled against on the merits. We continued the stay on condition a petition for certiorari was filed within 60 days from the denial of rehearing. Our assumption was that this would permit Supreme Court disposition this Term." (App. H7)

After seventeen years of litigation the Federal Communications Commission has been fully sustained by the Court of Appeals in its final resolution of the question of which of the various competing applicants should be awarded a license to operate a Channel 5 television station in Boston. None of the petitions for *certiorari* filed by the three unsuccessful applicants presents any grounds for Supreme Court review or further prolongation of these proceedings.

This case presents none of the grounds customarily relied upon in an application for review of a federal agency action. No general question of statutory interpretation is involved. No conflict of decisions can be alleged. No issue of federal law of substantial importance is presented which has not been, but should be, settled by this Court. It is not claimed that the court below has decided a federal question in a manner conflicting with an applicable decision of this Court. Rather, WHDH relies on the uniqueness of the case to invoke the clause in Rule 19 of this Court dealing with an action of a lower court which "so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision." Consideration of the facts and the law will quickly demonstrate, however, that few less likely candidates have ever been presented to this Court for *certiorari* on this or on any other ground.

I. THE WHDH PETITION (CASE NO. 1622)

At page 27 of its petition, WHDH states that "this is indeed a unique case". In its Conclusion it says:

> "This case cannot fairly be characterized other than as a blot on, and a grievous injury to, the administrative process."

BBI agrees with both of these observations, although for reasons at substantial variance from those advanced by WHDH.

This case is unique because WHDH is the only applicant-permittee of a television station found by the Commission to have been guilty of tampering with its administrative processes which was nevertheless permitted to compete with new applicants on an equal

basis in a reopened proceeding,[1] and to continue to operate the facility at issue during such further proceedings.[2]

The case is a blot on the administrative process because of the length of time it has taken to vindicate the public interest after it was established that WHDH had sought, off the record, to influence a Commission decision. This case has achieved a unique place in the annals of administrative law for the inordinate length of time consumed by the proceedings. Nearly thirteen years have passed since the Court of Appeals for the District of Columbia Circuit was informed of testimony before the Legislative Oversight Committee of the House of Representatives concerning *ex parte* approaches by WHDH, Inc., to the then-Chairman of the Commission. It is over ten years since the Commission unanimously found that such approaches occurred and were designed to influence the Commission outside the recognized processes of adjudication. It is nearly nine years (three regular television license terms) since WHDH received its bobtail "four-month license".

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[1] In the Miami Channel 10 and Channel 7 cases, every applicant guilty of *ex parte* conduct, whether resulting in actual contact with a Commissioner or not, was disqualified. See *WKAT, Inc.* v. *F.C.C.*, 258 F. 2d 418 (D.C. Cir., 1958); *Biscayne Television Corp.*, 31 FCC 237 (1961). See also *South Florida Television Corp.* v. *F.C.C.*, 349 F. 2d 971 (D.C. Cir., 1965); *Community Broadcasting Corporation* v. *F.C.C.*, 363 F. 2d 717 (D.C. Cir., 1966).

[2] In the Jacksonville and Orlando proceedings, where *ex parte* activities were shown to have occurred in the original proceedings, but not on behalf of the winning applicants, the Court of Appeals nonetheless directed further proceedings on a new record, and required that the interim operation of the station be by a group composed of all new applicants; see *Community First Corporation* v. *F.C.C.*, 403 F. 2d 578 (D.C. Cir., 1968); *Consolidated Nine, Inc.* v. *F.C.C.*, 403 F. 2d 585 (D.C. Cir., 1968).

A.

The Commission's Treatment of WHDH as Not Being an Ordinary Renewal Applicant Was Fully Justified.

The foundation upon which all of WHDH's arguments rest is that it is a "regular renewal applicant" entitled to certain benefits which it has not received. WHDH persists in this argument despite the fact that the Hearing Examiner found, without exception by WHDH, that it did not have such status, and the Commission clearly reached the same result as the Examiner.

In paragraph 729 of his Initial Decision, Examiner Sharfman defined WHDH's status as follows:

> "729. Only superficially ambiguous is WHDH's position. On examination the ambiguity disappears. In approving WHDH's application for a short term only, the Commission neither blessed nor irrevocably condemned it, but allowed it to live, knowing that its Mayfly's term would be extended by operation of the APA's section 9, section 307(d) of the Communications Act, and rule 1.62, pending final decision after hearing on its application. The Commission, by its actions, defined the nature of WHDH's tenure. It is not an occupant under an ordinary authorization, but one who was expected shortly to justify its claim to continued existence. All licensees are subject to the possibility that someone may try for their places, but as Commission records show, the likelihood of a contest between an incumbent and another is small; in the present case, however, it did not take unusual prescience to forecast the filing of competing applications for the WHDH channel. In this inevitable contest it could not have been the Commission's expectation that WHDH would be entitled to assert competitive advantages merely because it is a renewing licensee; nor can Hearst

and Wabash Valley be regarded as supporting any such claim, if WHDH meant to advance it by its citation of these cases (par. 721, above)." (App. D-2, pp. 274a-275a)

WHDH did not take exception to this description of its status.

In its May 20, 1969 Opinion and Order disposing of Petitions for Rehearing of its January 22, 1969 Decision the Commission stated:

> "40. In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the '. . . inroads made by WHDH upon the rules governing fair and orderly adjudication . . . .' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for Channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." (App. D-3, p. 322a)

The court below agreed with the Commission (App. A, pp. 21a-26a), and disposed of WHDH's argument in the following terms:

> "WHDH insists, however, on an approach which would give it all the rights and expectancies of an ordinary renewal applicant. In the ordinary case such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. This position does not fairly characterize the situation of a licensee which, by virtue of its officer's impropriety, has been given only temporary operating authority of one kind or another (including the 4-month license). This was the conclusion of both the Hearing Examiner and the Commission (as refined on reconsideration), and we think it within the range of reasonable discretion." (App. A, p. 33a)

WHDH (pp. 13-14) relies on the Commission's 1970 *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants* (App. F), and seeks to distinguish the exception in that *Policy Statement* for "those unusual cases, generally involving court remands, in which a renewal applicant is for *sui generis* reasons to be treated as a new applicant." (App. F, p. 379a). The language of the exception is tailor-made to fit this case: Indeed, on the very day of the *Renewal Policy Statement's* adoption, the Commission in a related action expressly noted that "the WHDH case was not the usual comparative renewal case but rather was of a *sui generis* nature . . . ." *BEST, et al.*, 21 FCC 2d 355 (1970).

The simple fact is that this has been a unique case since Mr. Choate's contacts with FCC Chairman Mc-

Connaughey were first publicly disclosed in 1958. It has continued to be a unique case ever since. In support of its argument that it has been the victim of a discriminatory injustice, WHDH readily concedes that this is a unique case, and asserts that "this case can never recur". But the fact is that it can recur, and it will, whenever an applicant before an administrative agency is found to have tampered with its processes. The likelihood of its recurrence depends in substantial measure upon the willingness of the agencies and the Courts to deal with such attempts quickly and effectively.

In claiming that it "stands as the only licensee with a valid existing license that has ever been given comparative consideration under the criteria reserved for initial applicants in the Commission's entire history" (p. 17), WHDH has overlooked some fairly recent history. Four month licensees other than WHDH have been required to undergo comparative hearings before the Commission without the benefit of any special status as a licensee seeking renewal. Indeed, in these other cases these special licensees (unlike WHDH) had engaged in no wrongdoing, but had received abbreviated licenses only because the wrongful conduct of other earlier competitors had left them as the sole qualified applicants: *L. B. Wilson, Inc.*, 37 FCC 511 (1964), aff'd. *sub nom. South Florida Television Corp.* v. *F.C.C.*, 349 F.2d 971 (D.C. Cir., 1965), *cert. den.* 382 U.S. 987 (1966); *Sunbeam Television Corporation*, 38 FCC 805 (1965), aff'd. *sub nom. Community Broadcasting Corporation* v. *FCC*, 363 F.2d 717 (D.C. Cir., 1966). The *Wilson* and *Sunbeam* proceedings, like this one, had their inception in the *ex parte* disclosures of the late 1950's. *Wilson* and *Sun-*

beam were the surviving unblemished applicants for Miami Channels 10 and 7, respectively, and each was awarded a license limited to four months, in order to afford an opportunity for new applicants to come forward. Following further comparative hearings, the Commission renewed the *Sunbeam* and *Wilson* licenses, but only because each had established its superiority over the new, competing applicants under the Commission's standard comparative criteria, and not because either was entitled to special consideration merely because it was an applicant seeking renewal of license. It becomes apparent that solid precedents support the treatment accorded WHDH.

B.

WHDH Has Had Full Judicial Review of Its Arguments.

Obviously as an afterthought, WHDH argues that the action of the Commission in limiting WHDH to a 4-month license was based upon a factual record that was never the subject of judicial review (p. 24). The record shows otherwise, however, for the Commission's Findings and Conclusions, based on the special hearing before Judge Stern, were confirmed and adopted in the Commission's September 25, 1962 decision (App. D-3, p. 327a). WHDH appealed from that order in 1963 (D.C. Cir. No. 17,788), and consideration of that interrupted case was consolidated with the appeals from the Commission's 1969 grant to BBI. In the opinion below, nine pages (App. A, pp. 17a-35a) are devoted to the findings, reasoning and conclusions of the July 1960 decision of the Commission and of the November 1960 Report to the court below and to the remedial measures the Commission adopted in the light of such conclusions. Noting that

the Commission had taken a different view of Choate's conduct than Judge Stern, the Court held: "The Commission was within the range of its discretion when it found misconduct"; "when it decided to take remedial measures"; and "when it adopted, as successive remedial measures, voiding the original grant to WHDH . . . , remanding for a comparative reevaluation of the original applicants; confining the grant to WHDH . . . to a mere 4-month operating license; providing for a reopening period of two months in order to permit a comparative evaluation with new applicants proposing to serve the public interest." (App. A, p. 30a).[3] Clearly, WHDH has had its review.

C.

In Its Review of the Commission's Decision the Court Below Followed the Chenery Doctrine Scrupulously.

Notwithstanding the clear language of paragraph 40 of the Commission's May 20, 1969 Memorandum Opinion and of its decision in *BEST, supra,* Petitioner WHDH insists that the Court below fashioned an original basis of support for the Commission's conclusions which was not even suggested in the agency's pronouncements.

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[3] The frivolous nature of WHDH's argument is revealed by its suggestion that, in referring to the Commission's July 1960 Decision rather than its November 1960 Report and Recommendation, the Court below reviewed the wrong document (p. 24). The facts are as stated in an interlocutory order of the Commission adopted May 24, 1961:

> "The United States Court of Appeals for the District of Columbia Circuit has approved the Commission's Report and Recommendation, *which document embodied the findings and conclusions contained in the Commission's Decision of July 14, 1960. . . . (WHDH, Inc.,* 20 Pike and Fischer Radio Regulation 410e) (emphasis supplied.)

No more answer to Petitioner's *Chenery*[4] argument would appear to be required than what is found in the four corners of the opinion below. The Court's review of and reliance upon the findings with reference to Mr. Choate's *ex parte* approaches were fully set forth (App. A, pp. 27a-30a). Its study of and dependence upon the Commission's analysis of the unique nature of the renewal application here in issue, were clearly stated (App. A, pp. 22a-26a). In a word, the record leaves no room for doubt that it was the Commission and not the Court of Appeals which supplied the rationale of the decision in this case.

II. THE CHARLES RIVER PETITION (CASE NO. 1708)

A.

The Court Below Correctly Held That the Commission's Decision Was Supported by a Majority of a Quorum.

The no-quorum and no-majority-of-a-quorum argument of Petitioner Charles River was made below and characterized by the Court as "a subtle, technical contention which is deftly stated" (App. A, p. 39a). The Court below disposed of the point in the following language:

> "The short answer is that four out of seven Commissioners constitutes a quorum; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present; and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI.

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[4] *Securities & Exchange Commission* v. *Chenery*, 318 U.S. 80 (1943) and 332 U.S. 194 (1947).

> Even assuming that Commissioner Johnson voted for BBI solely in order to avoid an impasse and to provide an effective order, that is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality. Government often involves the choice of the feasible, and the selection of the least undesirable alternative. It is accepted judicial practice for a judge to cast a vote, at least assuming no violation of conscience is involved, in order to avoid an impasse and secure a legally effective mandate for the court. We also note that when this point was raised in the application of Charles River for reconsideration, Commissioner Johnson expressed no reservation in voting to deny that application and uphold the grant to BBI." (App. A, pp. 39a-40a) (footnotes omitted)

In his opinion, C mmissioner Johnson said ". . . my participation is necessary to constitute a working majority for decision. Accordingly, I concur in today's decision" (App. D-1, p. 78a). This makes it clear beyond doubt that Charles River's contentions to the contrary notwithstanding, he was concurring, not abstaining, and he was agreeing with, not rejecting the rationale of Commissioners Bartley and Wadsworth. Commissioner Johnson's unreserved joinder in the rejection of Charles River's petition for rehearing raising the no-quorum point (App. D-3, pp. 316a, 317a, par. 25) is conclusive confirmation that a majority of a quorum voted for BBI.[5]

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[5] It is true that in passing on the petition for rehearing, the Commission did not expressly deal with the no-majority-of-a-quorum argument, as asserted by Petitioner Charles River (p. 15). But that fact can give Petitioner little comfort since the reason the argument was not considered is that it was never made by Charles River before the Commission, at least in any understandable form, and, therefore, on familiar principles should not even be open here.

B.

There Was No Error by the Commission or the Court Below in Declining To Attribute General Unreliability to BBI Because It Was Assigned a "Slight Demerit Because of Its Insufficiently Supported Local Live Program Proposal".

In Section B of its Argument, Petitioner Charles River (pp. 15-17) attempts unsuccessfully to balance its whole case on the point of a needle. The entire claim there made of "a serious defect in the substantive aspects of the Commission's decision making process" (p. 15) rests completely on a finding of the Examiner, asserted by Petitioner to have been accepted by the Commission, that BBI's local programming proposal had been "flashed for its supposed value in a comparison" (p. 16). It is true that the Examiner found that BBI's large amount of proposed local live programming "intensifies the suspicion that BBI's figure . . . was flashed for its supposed value in a comparison" (App. D-2, p. 288a, par. 762). It is also true, however, that BBI excepted to this conclusion in its Exception 138, as follows:

> "138. To Paragraph 762, insofar as it infers that the BBI proposal for local live programming 'was flashed for its supposed value in a comparison' as a wholly unwarranted and unsupported conclusion."

This exception was granted by the Commission in the following language:

> "Exception No. 138. Granted and the complained of phrase in par. 762 of the examiner's initial decision is deleted." (App. D-1; p. 73a).

With the removal of what was already fragile support for a shaky argument, the entire structure of Section B collapses. All that is left is the assessment by

the Commission of a slight demerit to BBI because of its insufficiently supported local live programming proposal (App. D-1; par. 39, p. 67a), held by the Commission to be "offsetting" against a slight demerit assessed against Charles River (App. D-1, pp. 67a-68a). This was quite properly held by the court below as far short of a character defect which might vitiate the BBI application (App. A, p. 40a).

In any event, this question is entirely factual in nature, depends upon an evaluation of the record, and clearly does not warrant further review by this Court.

III. GREATER BOSTON'S PETITION (CASE NO. 1716)

A.

There Was No Error by the Commission or the Court Below in Their Treatment in 1969 and 1970, Respectively, of Contentions of Greater Boston I Attacking the Validity of the Grant of a Four-Month License to WHDH in 1962.

Greater Boston I rests its petition on the contention that, in the procedural maze of these consolidated cases, the application of Greater Boston I became lost in the shuffle of court review. The fact is that it was the *applicant,* not the *application,* which became lost, as an examination of its schizophrenic history will quickly establish. Moreover, the Opinion of the court below makes it plain that Greater Boston I's contentions were fully considered, even though, because of their lack of merit, their disposition required little space.

Petitioner Greater Boston Television Corporation (Greater Boston I) was incorporated in 1952 (p. 5) and filed its application to operate on Channel 5 in Boston in 1953. It is from the lower court's affirmance of the Commission's 1962 denial of that application that it is now seeking review. In 1963, Greater

Boston TV Co., Inc. (Greater Boston II) was incorporated and it filed its application to operate on Boston Channel 5 in March of that year, responding to the same invitation which beckoned BBI and Charles River. Of the 36 stockholders of Greater Boston I, two had died and 4 others had moved far away from Boston; the remaining 30 were invited to participate and 26 accepted in addition to 14 newcomer invitees (App. D-2; par. 200, p. 138a). Because of the substantial identity in ownership of the two corporations, it was necessary for Greater Boston II to obtain a waiver of the Commission's Rules against repetitious applications. (App. D-2, p. 81a, par. 1; p. 142a, par. 218) The rationale of the Commission in granting the waiver obviously was to permit the principals of Greater Boston I to update their showing to the Commission so that they might compete with WHDH on a fresh rather than a stale record. (App. D-1, p. 53a, Fn. 3) From the subsequent conduct of the Greater Boston principals, it appears that *their* rationale in seeking the waiver was the exact opposite of the Commission's. Their preparation for the new proceeding began and ended with the formation of a new corporation. Instead of updating their presentation to the Commission, they defaulted so completely before the Examiner that Greater Boston II was disqualified even from comparative consideration (App. D, pp. 57a, 70a). Although Greater Boston II noted an appeal from the disqualification, its brief was rejected as in violation of court rules. Now in the guise of Greater Boston I, essentially the same principals come before this Court claiming minimal connection with Greater Boston II and with its collapse in the second proceeding. Their goal is to attempt by some alchemy to convert their corporate veils into iron curtains, in disregard of the fact

that the record was closed on their comparative case over fifteen years ago.

Jointly or severally the Greater Boston applicants are anachronisms, without legal support for their position. Although Greater Boston II has not petitioned for *certiorari,* the aroma of its presentation still surrounds Greater Boston I because of the overlapping of principals. Of the five members of the Commission participating in the 1962 Decision, review of which is now sought, not a single one voted for Greater Boston I. Moreover, in reviewing that Decision, the Court below specifically referred to its reexamination of the Commission docket before it in 1963 (App. A, p. 27a). It was well aware of Petitioner's argument that WHDH should be absolutely disqualified because of Mr. Choate's *ex parte* activities (App. A, p. 32a). Indeed, the final words in its Opinion were devoted to the primary objective of the Greater Boston principals which was to confine the Commission in the Boston Channel 5 case to consideration limited to the original record made in the 1950s. (App. A, p. 43a, Fn. 44)

It becomes clear that not only has Petitioner had its day (in fact, years) in court, but that no party except WHDH has had more chances to gain the right to operate on Channel 5 than the Greater Boston principals. For them no less than for WHDH, all good things must end.

IV.

CONCLUSION

Since 1957, WHDH has buttressed its influence over the Boston area by adding the power of a television station to that of a 50,000 watt AM station, a full power FM station and its newspapers. It has reaped large

economic benefits from its television operation. It has devised ingenious means for perpetuating this case far beyond the period that anyone but Petitioner WHDH could have dreamed possible. It appears to have an apparently inexhaustible stock of dilatory tactics in mind to postpone the inevitable day its television station will go off the air.[6]

When this case came before the Court of Appeals in 1970, it presented a tangled skein, procedurally and substantively, complicated by the series of appeals, remands and consolidations, which all derived from the "violence to the integrity of the Commission's processes" done by WHDH's improper *ex parte* contacts. With painstaking care, in an opinion which is a model of judicial conscientiousness and scrupulous concern

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[6] Notwithstanding the expressed concern of the court below with the delays in concluding this proceeding, WHDH on March 9, 1971, filed with the court a "Motion to Remand" the proceeding to the Commission for the purpose of probing the mental processes of one of the Commissioners participating in the 1969 Decision. The Motion was denied by the court on April 15, 1971, in an order set forth at Appendix H to WHDH's Petition. Six days later, and just two days before lodging its Petition with this court, WHDH filed with the Commission a "Petition for Further Proceedings on Application of Boston Broadcasters, Inc.", in which it prays that the Commission conduct an investigation into the qualifications of BBI on the basis of "newly-discovered" evidence, some of which predates the Commission's 1969 Decision. Supporting Comments were submitted by Charles River and an extensive Opposition, by BBI. On May 18, 1971, BBI filed with the Commission a Request for Specification of Termination Date predicated in part upon the abuse of process manifested by WHDH's repeated and baseless filings in defiance of uniformly accepted concepts of administrative finality and orderly judicial review. The dilatory intent of the WHDH-Charles River filings is further confirmed by Charles River's gratuitous suggestion (p. 18, Fn. 3) that this Court postpone disposition of its own petition for *certiorari* until the Commission has acted on the matters pending before it.

for the rights of all the parties, the Court of Appeals patiently unraveled the skein and carefully considered every facet of the case. Every question now raised before this Court in each of the three petitions for *certiorari* was fully examined and correctly disposed of in the court below. We respectfully urge that, in the interest of sound judicial administration as well as preventing further unnecessary prolongation of an already far-too-long litigation, the time has come to close the books on the Channel 5 case by a prompt denial of the writs at the present term of Court.

Respectfully submitted,

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PETITIONER'S REPLY TO BOSTON BROADCASTERS, INC. BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BOSTON BROADCASTERS, INC. BRIEF IN OPPOSITION

First. The thrust of our petition was that the essential ground taken by the court below for sustaining the Commissioner's crassly discriminatory treatment of

WHDH, the so-called "tainted overtures" of the late Mr. Robert B. Choate (Appendix A, pp. 26a-33a), had specifically been rejected by the Commission as a basis for decision in this case, so that reliance thereon by the court below involved an obvious violation of the *Chenery* doctrine (Pet. 5-8, 11, 15-16, 20-23), violation the more indefensible since the Commission's rejection of Chief Justice Stern's basic finding of no impropriety (Pet. 5) had never been judicially reviewed (Pet. 24-26).

Second. Mindful of the restrictions of Rule 24(4), we refrain from either restating or rearguing those matters. But we do not read that Rule as precluding our showing, by way of essential corrective, that the assertion of Boston Broacasters, Inc. (BBI), that "WHDH Has Had Full Judicial Review of Its Arguments" (BBI Br. Op. 11-12), is completely and utterly without foundation.

Third. The fact of the matter—the documented fact of the matter—is that when the court below in this case undertook to sustain the Commission on a ground that that agency specifically declined to espouse, the so-called "tainted overtures", the court of appeals did so without having before it the part of the record that dealt with the late Mr. Choate's two non-private luncheons in public dining rooms a year apart. Not only that, but the Commission refused to refile the record made before Judge Stern containing the evidence dealing with the Choate matter and the portion of the record made before Examiner Sharfman containing evidence on the effect of Choate's death; not only that, but the court below refused to direct the Commission to file this record; not only that, but the court below

refused to permit either WHDH or Greater Boston (presently petitioner in No. 1716) to file any briefs with respect to the Choate portion of the record.

Otherwise stated, the court below not only affirmed the Commission by disregarding the *Chenery* rule, it has affirmed the Commission, not by considering "the whole record" (*Universal Camera Corp.* v. *NLRB,* 340 U.S. 474), but by considering no record at all in support of its primary ground of decision.

In order not to lengthen unduly the body of the present memorandum, we document in an Appendix hereto the essentials of the foregoing paragraph, and we have lodged with the Clerk the text of the several papers from which that documentation is drawn.

Fourth. In view of that documented demonstration, it will become apparent that BBI's argument by epithet—"guilty of tampering with the administrative process" (BBI Br. Op. 5); "improper *ex parte* contacts" (*Id.* 19)—exposes itself as the usual last resort of a litigant whose case is weak on facts and law alike.

CONCLUSION

This case involves grossly arbitrary agency action on the part of the Commission, compounded by a palpable violation of the *Chenery* principle by the reviewing court. The latter violation has been further compounded, as we have just shown, by the reaching of essential conclusions drawn not from a record following argument—for a motion to send for the pertinent record and the right to brief that issue were both denied—but drawn instead out of thin air from materials of spontaneous generation.

This Court should not permit to pass by on the other side such utter disregard of hitherto established standards of judicial review.

Respectfully submitted,

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June 1, 1971

APPENDIX

APPENDIX

APPENDIX

1. *Identification of Docket Numbers in the Court Below:* The decision reported at 334 F.2d 552, which remanded the case to the Commission for consideration of the effect of Mr. Choate's death, dealt with Nos. 17785 and 17788, the appeals respectively by Greater Boston Television Corp., now Petitioner in No. 1716 (Great Boston I), and WHDH from the September 1962 decision reinstating the latter's construction permit (33 FCC 449 and 537). In the same decision, WHDH was granted a license.

The decision now sought to be reviewed involved originally three appeals from the Commission's 1969 decisions, which denied renewal of license to WHDH and awarded a construction permit to Boston Broadcasters (16 FCC 2d 1; 17 FCC 2d 856), as follows: No. 23,154, appeal by Charles River (now petitioner here in No. 1708, this Term); No. 23,159, appeal by WHDH (this petitioner, in No. 1622); and No. 23,172, appeal by Greater Boston TV Co., Inc. (Greater Boston II).

2. *Commission's Refusal to File Record Containing Choate Materials:* On December 30, 1969, counsel for WHDH requested the Commission's Assistant General Counsel in charge of litigation to transmit to the court below all of the record made before Examiner Sharfman (which includes the evidence bearing on the effect of Choate's death). (Item A in listing below). On January 2, 1970, this request was refused (Item B). On January 6, 1970, counsel for WHDH repeated this request, invoking Rule 17(b), F.R.App.P., and particularly relying on the "request of a party" clause of that Rule (Item C). No further action was taken by the Commission on that request.

3. *Sua Sponte Consolidation:* Notwithstanding the fact that the record relating to the subject matter of cases 17785 and 17788 below, the portion of the renewal record relating to the effect of Choate's death, were not on file with the court of appeals, Wright, Circuit Judge, in Chambers, on February 20, 1970, ordered, *sua sponte,* the consolidation

of those two cases with cases 23,154, 23,159, and 23,172, "which are presently set for argument at 2:00 p.m., Friday, March 6, 1970" (Item D). Thereafter, largely because of the illness of counsel, argument was postponed until May 25, 1970.

4. *Motion to Sever:* WHDH, presently petitioner in No. 1622 here, and Greater Boston, presently petitioner in No. 1716 here, moved below on March 20, 1970 to sever the Choate cases, Nos. 17785 and 17788, from the latter appeals, Nos. 23154, 23159 and 23172 (Item E).

This motion recited in ¶ 7 the Commission's failure to respond to the court of appeals' remand of April 16, 1964 (334 F.2d 552) in cases 17785 and 17788, as well as the Commission's failure to file any of the evidence taken with respect to that remand issue.

The motion called attention of the court to the fact that the record in these cases was not before it, and that the remand issue therein had not been briefed. ¶ 7 reads:

> "7. Other than lodging with this Court copies of its January 23 and May 20 Decisions, the Commission has made no response to this Court's April 16, 1964 Remand in Cases 17,785 and 17,788. The Commission has not refiled the record in Cases 17,785 and 17,788 which the Court returned to it when it made its remand in April 1964, nor has the Commission filed with this Court any of the evidence taken with respect to the remand issue under its Order of May 8, 1965. WHDH, in its appeal from the denial of its application for renewal of license, Case No. 23,159, has not dealt with the question of the effect of Mr. Choate's death upon the demerit assessed by reason of his alleged *ex parte* conduct because of the Commission's explicit reiterated statements that it had not based its denial of the WHDH renewal upon this ground. Charles River, in its appeal, Case No. 23,154, has taken no issue with the Commission's refusal to consider the effect of Mr. Choate's death upon the assessed demerit for his alleged *ex parte* conduct, nor has Greater Boston TV Co., Inc. (Greater Boston II) raised any such point

in its appeal in Case No. 23,172. Neither does any of these appeals raise any issue with respect to whether or not the Commission rightly refused to modify its September 25, 1962 Decision. Consolidation of Case Nos. 17,785 and 17,788 with Case Nos. 23,154, 23,159 and 23,172, therefore, has not served to put before the Court either evidence or argument bearing upon the question remanded by the Court to the Commission in April 1964."

The motion then pointed out that the Choate issue could not be decided without the record and without briefs and argument thereon, as follows:

"8. Resolution of the remand issue in the 1963 appeals (Cases 17,785 and 17,788) can only be achieved by this Court if it has the evidentiary record made thereon before it. We submit, therefore, that it should direct the Commission to file the evidentiary record made pursuant to this Court's remand forthwith so that the Court will be in a position to determine whether the Commission has properly carried out the direction of this Court in its remand order of April 16, 1964 and so that it may make ultimate disposition of the 1963 appeals. It is also submitted that it would be helpful to the Court and fair to the parties therein if they were directed to file memoranda or briefs and present argument, within a short time after the record is before the Court, directed to the question of whether the Commission has initially made 'an appropriate net assay' of the effect of Choate's death upon its September 25, 1962 decision and what ultimate disposition this Court should make of Case Nos. 17,785 and 17,788."

The motion concluded with a prayer for severance because of the inadequacy of the record:

WHEREFORE, since consolidation of the 1963 appeals with the 1969 appeals does not serve to provide an appropriate record on the basis of which the Court can dispose of the issues raised in the earlier appeals and by its April 16, 1964 Remand Order therein, but will serve only to complicate the ultimate resolution of the 1963 appeals by introducing parties who are strangers

and issues which are extraneous to them, it is respectfully prayed that the Court sever Case Nos. 17,785 and 17,788 from Case Nos. 23,154, 23,159 and 23,172.

The Commission opposed (Item F). In ¶ 1 of its response, it asserted that "To consider these cases separately as WHDH now submits will not only provide an artificial division of cases but will unduly prolong their eventual resolution." The Commission then said (¶ 4), "Attached to this Opposition is an index to the earlier record and should the Court determine that the actual docket volumes are necessary the Commission will, of course, lodge them promptly."

On April 20, 1970, however, the court below (Leventhal, Acting Chief Judge, in Chambers) denied the motion to sever (Item G).

5. *Summary:* The foregoing recital, we submit, fully documents the assertion made by us in Point *Third* of the present memorandum,

> "that when the court below in this case undertook to sustain the Commission on a ground that that agency specifically declined to espouse, the so-called 'tainted overtures', the court of appeals did so without having before it the part of the record that dealt with the late Mr. Choate's two non-private luncheons in public dining rooms a year apart. Not only that, but the Commission refused to refile the record made before Judge Stern containing the evidence dealing with the Choate matter and the portion of the record made before Examiner Sharfman containing evidence on the effect of Choate's death; not only that, but the court below refused to direct the Commission to file this record; not only that, but the court below refused to direct the Commission to file this record; not only that, but the court below refused to permit either WHDH or Greater Boston (presently petitioner in No. 1716) to file any briefs with respect to the Choate portion of the record."

SCHEDULE OF PAPERS LODGED WITH THE CLERK

A. Letter, Dempsey (Counsel for WHDH) to Conlin (Assistant General Counsel, FCC), December 30, 1969.

B. Letter, Conlin to Dempsey, January 2, 1970.

C. Letter, Dempsey to Conlin, January 6, 1970.

D. *Sua Sponte* order of consolidation, *per* Wright, Circuit Judge, February 20, 1970.

E. Motion by Greater Boston and WHDH to Sever Case Numbers 17785 and 17788 from Case Numbers 23154, 23159 and 23172, March 20, 1970.

F. FCC's Opposition to Motion to Sever, March 30, 1970.

G. Order denying motion to sever, *per* Leventhal, Acting Chief Judge, April 20, 1970.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statutes and regulations involved	3
Questions presented	3
Statement	4
Argument	12
Conclusion	20

CITATIONS

Cases:

Citizens Communications Center v. *Honorable Dean Burch*, No. 24,221, C.A.D.C.	14
Citizens Communications Center v. *Federal Communications Commission and United States of America*, No. 24,471, C.A.D.C.	14
Federal Communications Commission v. *WOKO, Inc.*, 329 U.S. 223	19
Federal Trade Commission v. *Flotill Products, Inc.*, 389 U.S. 179	17
Greater Boston Television Corp. v. *Federal Communications Commission*, 334 F. 2d 552	2
Hampton Roads TV Corporation v. *Federal Communications Commission*, No. 24,491, C.A.D.C.	14
Jacksonville Broadcasting Corp. v. *Federal Communications Commission*, 348 F. 2d 75, certiorari denied, 382 U.S. 893	13
Massachusetts Bay Telecasters v. *Federal Communications Commission*, 261 F. 2d 55	2
Massachusetts Bay Telecasters v. *Federal Communications Commission*, 295 F. 2d 131, certiorari denied, 366 U.S. 918	2, 5
Penn-Central Merger Cases, 389 U.S. 486	18
Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80	17, 18

Cases—Continued

	Page
WEBR, Inc. v. *Federal Communications Commission*, 420 F. 2d 158	19
WHDH, Inc., 29 F.C.C. 204	2, 5
WHDH, Inc., 33 F.C.C. 449	2, 5
WHDH, Inc., 1 Pike and Fischer R.R. 2d 468	2, 6
WHDH, Inc., 25 Pike and Fischer R.R. 78	2, 6
WIBC, Inc. v. *Federal Communications Commission*, 259 F. 2d 941, certiorari denied, 358 U.S. 920	17
WKAT, Inc. v. *Federal Communications Commission*, 296 F. 2d 375, certiorari denied, 368 U.S. 841	13–14
WORZ v. *Federal Communications Commission*, 345 F. 2d 85, certiorari denied, 382 U.S. 893	14
Statutes, rules and regulations:	
Communications Act of 1934, §§ 307(d), 309(b) and 310(b), 48 Stat. 1083, 1085, and 1086, as amended, 47 U.S.C. 307(d), 309(b) and 310(b)	3
Section 154(h), 48 Stat. 1066, as amended, 47 U.S.C. 154(h)	3, 7, 17
5 U.S.C. 557(c)	17
Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 1.533(a); 1.539(a) and (d), and 73.34(a)(8)	3
Miscellaneous:	
Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393	7, 8, 9, 10
Commission's 1970 *Policy Statement on Comparative Hearings Involving Renewal Applicants*, 22 F.C.C. 2d 424	11, 14

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 1708

CHARLES RIVER CIVIC TELEVISION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 1716

GREATER BOSTON TELEVISION CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–43a) [1] is not yet officially reported. The Federal Com-

[1] "Pet. App." refers to the separately bound Appendix in No. 1622, except that Pet. App. H appears at the back of the petition in No. 1622.

munications Commission's decision (Pet. App. 52a–79a) and its memorandum opinion and order modifying that decision in part (Pet. App. 306a–325a) are reported at 16 F.C.C. 2d 1 and 17 F.C.C. 2d 856, respectively. The initial decision of the hearing examiner (Pet. App. 80a–305a) is reported at 16 F.C.C. 2d 29.

Earlier court decisions connected with this case are *Greater Boston Television Corp.* v. *Federal Communications Commission,* 334 F. 2d 552 (C.A.D.C.) (Pet. App. 47a–51a); *Massachusetts Bay Telecasters* v. *Federal Communications Commission,* 295 F. 2d 131 (C.A.D.C.), certiorari denied, 366 U.S. 918, and *Massachusetts Bay Telecasters* v. *Federal Communications Commission,* 261 F. 2d 55 (C.A.D.C.). Earlier Commission decisions in this case are *WHDH, Inc.,* 1 Pike and Fischer R.R. 2d 468; *WHDH, Inc.,* 25 Pike and Fischer R.R. 78, 80; *WHDH, Inc.,* 33 F.C.C. 449 (Pet. App. 326a–344a); *WHDH, Inc.,* 29 F.C.C. 204.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1970 (Pet. App. 44a); petitions for rehearing were denied on February 16, 1971, (Pet. App. 44a); and the order of the court of appeals denying the motion of WHDH, Inc. to remand, denying various other motions, and granting WHDH a limited stay was entered April 15, 1971 (Pet. App. H1). The petition in No. 1622 was filed on April 23, 1971; that in No. 1708, on May 14, 1971; and that in No. 1716, on May 17, 1971. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

STATUTES AND REGULATIONS INVOLVED

Sections 307(d), 309(b) and 310(b) of the Communications Act of 1934 (48 Stat. 1083, 1085, and 1086, as amended, 47 U.S.C. 307(d), 309(b) and 310(b)) and pertinent provisions of the Rules and Regulations of the Federal Communications Commission (47 C.F.R. 1.533(a); 1.539 (a) and (d), and 73.34(a)(8)) are set forth at Pet. App. 383a–386a. Section 154(h) (48 Stat. 1066, as amended, 47 U.S.C. 154(h)) is set forth in the appendix to the petition in No. 1708 at p. 1a.

QUESTIONS PRESENTED

1. Whether there was a rational basis for the Federal Communications Commission's decision to consider an application for renewal of a television license on a comparative basis with other applications for the channel when the renewal applicant had been given only a limited license because of improper *ex parte* attempts to influence the Commission.

2. Whether the court of appeals affirmed the Commission's decision upon the same basis articulated by the agency.

3. Whether the Commission's decision was made by a statutory quorum.

4. Whether, in this case, the Commission correctly evaluated its comparative broadcast license factor relating to integration of ownership with management.

5. Whether the court of appeals adequately considered the appeal of Greater Boston Television Corporation from denial of its application for a license.

STATEMENT

In 1954 the Commission had before it for comparative consideration four mutually exclusive applications for a new television station on Channel 5 in Boston, Massachusetts. Among the applicants were WHDH, Inc. (petitioner in No. 1622), a subsidiary of the corporation which publishes a daily newspaper, the Boston Herald Traveler, and Greater Boston Television Corp. ("Greater Boston", petitioner in No. 1716). In April 1957, the Commission awarded the channel to WHDH, which began operation later that year (Pet. App. 4a).

While an appeal by Greater Boston and other disappointed applicants was pending, it came to the court's attention that the award might have been tainted by improper *ex parte* approaches to the Commision's Chairman. Retaining jurisdiction, the court remanded the case to the Commission for an evidentiary hearing on this issue.

The hearing, before a special examiner,[2] disclosed that Robert Choate, WHDH's principal, had arranged two luncheons with the Chairman: the first for the purpose of "sizing him up" and the second to urge him to support pending legislation which would restrict the Commission's policy of encouraging diversification of mass media. This policy was

[2] The Honorable Horace Stern, a former Justice of the Supreme Court of Pennsylvania.

a factor which could affect WHDH's pending application because of its newspaper affiliation. Rejecting its special examiner's recommendation that WHDH be exonerated, the Commission reported to the court that Mr. Choate had "demonstrated an attempted pattern of influence" in favor of WHDH, and that the "* * * attempt to establish such a pattern of influence does violence to the integrity of the Commission's process." *WHDH, Inc.*, 29 F.C.C. 204, 211, 212. The Commission proposed to vacate the original WHDH permit, grant special temporary operating authority that would allow WHDH to continue broadcasting, and reopen the entire proceeding for a new comparison of WHDH with the other applicants then before the Commission (Pet. App. 6a). The court approved and remanded. *Massachusetts Bay Telecasters Inc.* v. *Federal Communications Commission,* 295 F.2d 131, certiorari denied, 366 U.S. 918 (Pet. App. 6a).

At the conclusion of the reopened comparative hearing in 1962, the Commission awarded Channel 5 to WHDH, but it assessed a demerit against WHDH for Choate's improper conduct. Because, however, of "the inroads made by WHDH upon the rules governing fair and orderly adjudication," it granted only a special short-term license of four months instead of the normal three-year license. *WHDH, Inc.*, 33 F.C.C. 449, 454 (Pet. App. 331a).

Greater Boston and WHDH both appealed from this action by the Commission. In the meantime, on October 26, 1962 WHDH had filed for renewal of its

short-term license, and the Commission determined that the circumstances which had led to the short-term grant also constituted "compelling public interest considerations" warranting acceptance of competing applications for the channel. *WHDH, Inc.*, 25 Pike and Fischer R.R., 78, 80. Accordingly, on October 24, 1963, the Commission designated the WHDH application for comparative hearing with applications filed by Boston Broadcasters, Inc. ("BBI"), Charles River Civic Television, Inc. ("Charles River," petitioner in No. 1708) and Greater Boston TV Co. Inc.[a] *WHDH, Inc.*, 1 Pike and Fischer R.R. 2d 468, 472.

Then on December 21, 1963, Robert Choate died. On being informed, the court remanded the still pending appeals from the initial four-month grant, for consideration of the effect of Choate's death on that award as limited. It also authorized the Commission to combine issues in the remanded initial proceeding with the pending renewal proceedings (Pet. 49a–51a).

Both proceedings were in a comparative hearing status, but only WHDH and Greater Boston (see note 3, *supra*) remained in the initial proceeding (Pet. 83a–84a). After a lengthy hearing, an examiner made extensive findings of fact (Pet. 80a–303a). In the initial proceeding, he concluded that there were no material changes in WHDH as a result of Choate's death and that modification of the initial award would

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[a] The majority of the stockholders of Greater Boston TV, Co., Inc., had been stockholders in Greater Boston Television Corp., one of the original 1954 applicants for the channel which is the petitioner in No. 1716.

not serve the public interest (Pet. App. 55a, 259a–261a). In the renewal proceeding, he took note of the comparative factors set forth in the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393: past performance, diversity of media control, integration of ownership and management, and program proposals. He observed that under these standards WHDH would be downgraded in an initial licensing proceeding because in two respects, management-ownership integration and media diversity, it ranked well below its competitors (Pet. App. 297a). But relying on past Commission precedents,[4] the examiner ruled that these factors were not material on renewal (Pet. App. 301a) and that WHDH's satisfactory operating record entitled it to a significant degree of preference over competitors who could present only promises of future performance (Pet. 274a–275a; 298a). He recommended that WHDH's license be renewed.

On January 22, 1969, the Commission rejected the examiner's recommendation, and directed that Channel 5 be assigned to Boston Broadcasters, Inc. (BBI) (Pet. App. 52a–71a). Of the seven Commissioners, three did not participate, leaving a statutory quorum of four members. (47 U.S.C. 154(h).) Commissioners Bartley and Wadsworth joined in a written opinion rejecting WHDH and selecting BBI. (Pet. App. 52a–71a). Their opinion ranked WHDH below BBI and

[4] These cases held that a licensee seeking renewal is entitled to a significant preference over competing applicants because of past satisfactory operations.

Charles River in management-ownership integration and media diversity, which they found highly material; BBI was found to be superior to Charles River on integration, to have a slight edge in diversity, and to be about even on programming.[5] Commissioner Johnson concurred in a separate opinion indicating his agreement on the rejection of WHDH because of its newspaper affiliation; he stated that he lacked strong views as between the other two applicants, but joined in the choice between them for the purpose of constituting "a working majority for decision" (Pet. App. 78a). Commissioner Robert E. Lee dissented on the ground that WHDH's license should have been renewed under customary renewal criteria (Pet. App. 75a–78a).

The majority ruled that the examiner had erred when he gave a major preference to WHDH because of its prior operation on Channel 5 (Pet. App. 59a). It held that the 1965 *Policy Statement,* which was based on criteria not requiring new evidence in this proceeding, should govern the comparative evaluation (*ibid.*); under the *Policy Statement,* the Commission is to give weight to an applicant's past broadcasting record only if it is clearly superior or deficient (Pet. App. 60a). Since WHDH's record of past performance was only "within the bounds of average," it was not a factor entitled to weight in the comparative evaluation (Pet. App. 60a).

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[5] The fourth applicant in the renewal proceeding, Greater Boston TV Co., Inc., failed to meet preliminary noncomparative criteria in the estimation of both the Commission majority and the hearing examiner. See Pet. App. 269a; 58a.

In its opinion on reconsideration, adopted May 19, 1969 by the same three Commissioners who had made up the earlier majority (Pet. App. 306a), the Commission explained that its application of the 1965 *Policy Statement* to WHDH was due to the fact that WHDH, while technically a renewal applicant, was markedly different from regular renewal applicants. It stated (Pet. App. 322a–323a):

> * * * [W]e think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of three years. Thus, although WHDH has operated station WHDH–TV for nearly twelve years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular three-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of four months only because of the Commission's concern with the '* * * inroads made by WHDH upon the rules governing fair and orderly adjudication * * *.' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an Order directing that new applications for Channel 5 would be accepted within a specified two-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique

> events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license. (Pet. App. 322a–333a).

The Commission also made clear in this opinion that it agreed with the examiner's assessment of the effect of Choate's death and his conclusion that reevaluation and modification of the initial four-month award to WHDH would not serve the public interest (Pet. App. 315a–316a).

On appeals by WHDH, Charles River and Greater Boston, the court of appeals unanimously affirmed the Commission in an extensive opinion by Judge Leventhal (Pet. App. 1a–43a).

The court observed that the Commission had expressly put "this case in a special and unique category because of the past history of WHDH" (Pet. App. 24a). After reviewing this history, the court held that such special treatment was within the Commission's "reasonable latitude to keep its processes free of taint" when it found misconduct in Mr. Choate's *ex parte* contacts (Pet. App. 29a), and that the Commission's choice of remedial measures was "within the range of sound discretion" (Pet. App. 30a). It found procedurally fair the Commission's determination to apply its 1965 *Policy Statement* rather than the criteria used in ordinary renewal cases, because all parties were on notice as to the factors which would be considered in the comparative hearing (Pet. App. 31a). It was therefore appropriate for the Commission to use "the tainted overtures of WHDH as a reason for fresh consideration of all

applicants, without any special advantage to WHDH by virtue of its operation under lawful but temporary authority" (Pet. App. 31a).[6]

The court rejected Charles River's claim that less than a majority of a quorum effectively joined in the Commission's decision. It noted that the statutory four out of seven commissioners had participated; and that Commissioner Johnson had joined the significant decision on reconsideration without reservation as well as voting in favor of the original decision (Pet. App. 39a). It also ruled that, as between BBI and Charles River, the Commission had properly performed its responsibility in weighing the significance of the management-integration factor (Pet. App. 40a–43a).

Petitions for reconsideration were filed by WHDH and Greater Boston. The latter contended that its appeal from the initial decision had been overlooked. The court of appeals ruled that "after continuation of the careful study of the briefs and record that the oral argument showed was needful in view of the importance and complexity of the cases,"

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[6] The court noted the Commission's 1970 *Policy Statement on Comparative Hearings Involving Renewal Applicants*, 22 F.C.C. 2d 424 (Pet. App. 373). This Statement provides that, when in a comparative hearing an applicant for renewal of a license shows that its past performance has been substantially attuned to serving its area and is not otherwise deficient, its license will be renewed without further comparison. However, the court also noted that this Statement is expressly inapplicable to "those unusual cases, generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant." (Pet. App. 26a, n. 35; 379a.)

no modification was warranted either of the result or the views set forth in the opinion[7] (Pet. App. 45a).

ARGUMENT

Essentially, the issue presented by this case is whether the Commission properly selected a licensee for a valuable television channel from among various competing applicants. The proceedings were unusually protracted because of WHDH's tainted overtures in connection with its original license application and the various administrative proceedings and judicial remands which resulted therefrom. The enormous record and the claims of the competing applicants have been thoroughly canvassed by the Commission and the court below. The petitions present no question of general importance, and there is therefore no reason for plenary review by this Court or for further delay in finally implementing the Commission's decision.[8]

1. WHDH's contention that the Commission has singled it out as the only renewal applicant ever to

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[7] Subsequent to the petition for rehearing, WHDH filed a motion in the court of appeals to remand the case to the Commission for reconsideration in the light of certain statements of Commissioner Wadsworth, published in Broadcasting Magazine after he left the Commission. The court of appeals entered a further opinion in the light of the Commission's denial on March 3, 1971, of WHDH's request that the Commission move for a remand for these reasons. The court was satisfied with the FCC's disposition of the matter and could see no warrant for reopening the case to probe the mental processes of a Commissioner. (Pet. App. H4–H9). No petitioner raises this matter here.

[8] WHDH continues to operate Channel 5 pending final disposition by this Court.

be denied renewal rights (Pet. 20) is without merit. It claims that because it received a four-month license in the initial contest, it is entitled to the significant preference which the Commission gives to ordinary renewal applicants. But the Commission made it very clear that it had never considered WHDH to be an ordinary licensee (Pet. App. 322a–323a). The original grant to WHDH was tainted because of its principal's improper attempt to exert influence on the Commission in behalf of WHDH, which led to "unique events and procedures * * * [placing] WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license" (Pet. App. 323a).

On the unique and special facts of this case, the Commission's treatment of WHDH equally with the other applicants was not only rational, but also consistent with precedent. An analogous case is *WKAT, Inc.* v. *Federal Communications Commission,* 296 F. 2d 375 (C.A.D.C.), certiorari denied, 368 U.S. 841 There, because certain parties had made improper approaches to the Commission, the court of appeals approved a full, comparative hearing without preference for a renewal applicant who, like WHDH, had received a special four-month license.[9] See also *Jacksonville Broadcasting Corp.* v. *Federal Communications Commission,* 348 F. 2d 75 (C.A.D.C.), certiorari

[9] In the *WKAT* case, unlike the case at bar, the licensee seeking renewal of its four-month license had been free of any taint. Yet the Commission, because of the unique circumstances, ordered a full comparative renewal hearing with no preference to the incumbent. *WKAT, supra,* at 383.

denied, 382 U.S. 893; *WORZ* v. *Federal Communications Commission*, 345 F. 2d 85 (C.A.D.C.), certiorari denied, 382 U.S. 893. Similarly, the 1970 *Renewal Policy Statement* [10] confers no benefits upon WHDH, for by its terms it applies only to "regular renewal applicants" (Pet. App. 373a); it makes express exception for infrequent cases, such as this, "* * * generally involving court remands, in which the renewal applicant, for sui generis reasons, is to be treated as a new applicant" (Pet. App. 379a).[11]

WHDH would have the renewal of its license considered as if the original proceeding had been untainted, without regard to the continuing significance of the factors underlying the Commission's decision

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[10] The *Renewal Policy Statement* is at issue in a group of consolidated cases now under submission in the court below *Citizens Communications Center* v. *Honorable Dean Burch*, No. 24,221; *Citizens Communications Center* v. *Federal Communications Commission and United States of America*, No. 24,471; and *Hampton Roads TV Corporation* v. *Federal Communications Commission*, No. 24,491.

[11] Contrary to petitioner's suggestion (Pet. 14), there is nothing in the *Renewal Policy Statement* which limits the "unusual cases" exception to cases in which a court has vacated a Commission award and the Commission has then provided for interim operation by a different party. Rather, the Commission's language makes it clear that, while "generally" these cases will involve court remands, at other times they will not.

Nor does it advance petitioner's claim to be a regular renewal applicant that in this case the Commission chose not to vacate the 1962 short-term license and provide for interim operation. Petitioner fails to recognize that the Commission stated that "* * * an interim operation here is inappropriate inasmuch as the further proceedings have run their course with the result that the renewal application of WHDH has been denied, and BBI's application has been granted" (Pet. App. 322a).

to limit the initial grant. But the Commission's powers to remedy "the inroads made by WHDH upon the rules governing fair and orderly adjudication" (Pet. App. 331a; 33 F.C.C. 2d at 454) were not exhausted by the limitation of WHDH to a temporary license. It had a responsibility to the public which, given the unusual history of this case, led it to keep all parties "as close as possible to a new application situation" (Pet. App. 35a). As the court of appeals observed (Pet. App. 35a):

> Hand crafted orders and procedures are particularly appropriate for unique fact situations. On the unique facts presented, WHDH was neither a new applicant nor a renewal applicant as those terms are generally construed. Since these orthodox classifications, and the rules generally pertaining to each, were not meaningfully available to the Commission on these facts, that body soundly formulated an intermediate position for the instant case.

2. WHDH's contention that the court of appeals upheld the Commission's action on grounds not relied on by the Commission (Pet. 21) is without foundation. The court focussed on the principal issue—the Commission's decision to put WHDH's case in a special and unique category because of its past history (Pet. App. 24a)—and it proceeded thoroughly to review that history in order to test the reasonableness of the Commission's action. The court had before it not only the appeals from the renewal proceeding but also the appeals from the remanded initial proceeding, and Choate's misconduct was a factor in the Com-

mission's decision to limit the initial grant to four months and to consider renewal in a comparative hearing in which all applicants were on an equal basis. Thus, while that misconduct was not a factor in the comparative evaluation on renewal, it was nevertheless central to the Commission's disposition of the case as a whole and the court properly considered and upheld the Commission's determinations on this subject (Pet. App. 30a). The court was called upon to do so by WHDH's contention that it was entitled to the preference enjoyed by an ordinary renewal licensee. The court re-examined the entire docket, including the proceeding before the court in 1963 (Pet. App. 27a) and each of the grounds asserted by the Commission for rejecting WHDH. The proceedings relating to the selection of a licensee for Channel 5 have been the subject of a continuous judicial oversight by the court of appeals for more than a decade. This most recent—and perhaps final—opinion reflects a careful and painstaking review in the light of a carefully articulated restatement of the principles which govern judicial review of administrative action (Pet. App. 15a, 22a). No more was required.[12]

3. Charles River, petitioner in No. 1708, argues that the decision of the Commission must be overturned because a quorum of the Commission did not partic-

[12] Petitioner does not challenge here the Commission's judgment that it was deficient in integration and diversification; it has not argued to this Court—or argued seriously to the court below (Pet. App. 23a)—that these deficiencies are insufficient reason to deny its application, so long as the Commission's treatment of it on an equal basis with its competitors was proper.

ipate in the decision—or at least in the comparison between Charles River and BBI—and because even if a quorum did participate the vote of Commissioner Johnson cannot be considered because it was cast simply to produce a working majority for decision. But as the Court below ruled (Pet. App. 39a): "The short answer is that four out of seven Commissioners constitutes a quorum [47 U.S.C. 154(h)]; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present; [citing *WIBC, Inc.* v. *F.C.C.*, 259 F. 2d 941 (C.A.D.C.), certiorari denied, 358 U.S. 920] and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI" (Pet. App. 39a). Cf. *Federal Trade Commission* v. *Flotill Products, Inc.*, 389 U.S. 179.

Commissioner Johnson's vote was not vitiated because it was candidly cast in order to avoid an impasse and to provide an effective order. "That is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality" (Pet. App. 39a). That Commissioner Johnson had no reservations about supporting the majority was made manifest, as the court noted, by his subsequent joining in the denial of Charles River's request for reconsideration (Pet. App. 316a–317a).

Agencies must, of course, give reasons for their determinations (5 U.S.C. 557(c)), and under *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, those reasons form the basis for judicial review of their action. But neither the requirement for

findings nor the "limited office"[13] of the *Chenery* principle prevents individual commissioners from casting their votes in favor of an articulated decision so as to make it possible for the agency to function.

4. Charles River also contends (Pet. 15–17) that the comparison between it and BBI was flawed in the weighing process. The Commission gave BBI a slight demerit on the ground that its programming proposals seemed exaggerated, yet gave BBI a strong preference on the important management-ownership integration factor. Charles River appears to contend that the basis for BBI's representations concerning its program plans was found to be inherently incredible and that the integration criterion is therefore meaningless because it is concerned only with the liklihood of effectuation of the proposed programming.

This contention misconceives the basis for the demerit. The good faith and reliability of the overall BBI program proposal were never in doubt; indeed the Commission specifically rejected a finding by the hearing examiner that the BBI local live program proposal "was flashed for its supposed value in a comparison" (Pet. App. 73a, exception 138; Pet. App. 288). The Commission concluded only that the record did not offer sufficient support for a rather ambitious undertaking in the area of local live programs and that a demerit in this area, cancelled out by a similar demerit to petitioner, precluded favoring either applicant on the basis of proposed programs. Evaluation of such matters is peculiarly a task for the Com-

[13] See *Penn-Central Merger Cases*, 389 U.S. 486, 519, n. 10.

mission, when, as here, its reasoning is indicated with clarity and its findings supported by the evidence (Pet. App. 40a–43a). See *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229; *WEBR, Inc.* v. *Federal Communications Commission*, 420 F.2d 158 (C.A.D.C.).

5. Petitioner Greater Boston, an unsuccessful applicant in the original comparative proceeding which culminated in the four-month WHDH grant, contends in No. 1716 that the entire renewal proceeding should never have been held because WHDH's original application should have been denied outright rather than granted for a four-month period. It argues that the court below has never passed on the appeal it brought from that award and that the case should be remanded for this purpose. But the court below did give full consideration to the claims of Greater Boston. Its opinion expressly states that the court had "reexamined the Commission docket that was before us in 1963 when we remanded for further proceedings" (Pet. App. 27a) and concluded that "the Commission stayed within the range of sound discretion" in awarding WHDH its four-month license (Pet. App. 30a). The Court noted that Greater Boston's contention before the Commission that WHDH should have been disqualified represented the opposite extreme from WHDH's contention that it should have received a regular full term license in 1962, and it found reasonable the Commission's selection of an approach "in between these extremes" (Pet. App. 32a). Greater Boston was free to par-

ticipate in the comparative renewal proceeding, and a majority of its stockholders did so in reorganized form, as Greater Boston TV Co., Inc. (see p. 6, *supra*). Noting the successor relationship between the two firms, the court stated "we see no grounds for concluding that this appellant had a right to confine the Commission to consideration on the basis of the original record and to resist a fresh, comparative hearing" (Pet. App. 43a, fn. 44).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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